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ABSTRACT

This document contains the text of a Senate hearing called to examine proposed amendments (S.1703) to the Indian Self-Determination and Education Assistance Act (Public Law 93-638) and includes the language of the proposed amendments. The bill primarily addresses federal funding for tribal governments, federal Indian affairs programs, and Indian economic development. Statements are given by Ross O. Swimmer, Assistant Secretary for Indian Affairs; Dr. Everett Rhoades, Director of the Indian Health Service; and William R. Allen, Chairman of the Jamestown Klallam Tribe. Two attorneys, Reid Chambers and Eric Eberhard, comment on the Federal Tort Claims Act as it applies to Indian tribes engaged in providing social services mandated by U.S. law. Issues discussed include the use of contracts as a mechanism to provide the tribes with federal funds, indirect cost determinations and provision of funds to cover them, and administration of the Act. Two reports, "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred" and "Trend Analysis Using Data Available From the Indirect Cost Rate Negotiation Process with Indian Tribes," prepared by the Department of the Interior are appended. (DHP)

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S. Hrg. 100-369, Pt. 2

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987—PART II

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HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1703

TO AMEND THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

OCTOBER 2, 1987
WASHINGTON, DC

U.S. DEPARTMENT OF EDUCATION
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INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987

FRIDAY, OCTOBER 2, 1987

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:07 a.m., in room 485, Dirksen Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Evans, and McCain.

The **CHAIRMAN**. This morning the committee will receive testimony on S. 1703, a bill to amend the Indian Self-Determination Act. We will also hear the views of Administration witnesses regarding these amendments, and we will also have a panel of witnesses to expand on the tribes' point of view on the matters of indirect costs, federal tort claims coverage, and nonprocurement contracts.

The Indian Self-Determination Act is unique in that it requires Federal agencies to continue providing direct services until such time as Tribes freely choose to contract to operate those programs. At that point the Federal agencies are required to transfer resources and control over those programs to the tribes.

No other Federal agency is required to assist another governmental entity and simultaneously to divest itself of its own resources. In this sense, the Act contradicts all known laws of organizational behavior. We recognize that implementation of the Act has not been easy for either the tribes or the Federal agencies.

In addition, tribes and the Federal Agencies have attempted to implement this Federal policy during a period of tremendous competition among various Federal priorities, and during a period of budgetary constraints. As a result, there have been problems with funding for tribal indirect costs and for Federal costs for contract monitoring and personnel.

We have approached the development of these amendments with the philosophy that the tribes, the Bureau of Indian Affairs and the Indian Health Service must work together to increase the success of the Federal Policy of Indian Self-Determination. We have attempted to address some of the concerns of the Federal agencies regarding transfer of property to tribes, extending the time period for consideration of contract applications, and making permanent the protection of Federal personnel benefits for BIA or IHS staff who choose to work with tribes. We are open to further suggestions to making this law work better not only for tribes, but also for the BIA and IHS.

We also recognize that there has been tremendous progress made over the past twelve years. The BIA has over 1,400 contracts with Tribes, totalling approximately $280 million, or 25 percent of the budget. Tribal contracts with the Indian Health Service include the operation of six hospitals and 300 outpatient clinics, as well as many community health programs.

Our purpose here today is to explore ways to improve the Federal policy of Indian Self-Determination. And so I look forward to your comments and recommendations.

And speaking of comments and recommendations, it would have been helpful if the agencies had submitted their statements a bit earlier, as we have provided in our rules. And I would hope that in the future you would accommodate us. We need at least a few hours to look them over.

And so, I would like to now call upon the first panel, consisting of witnesses from the administration, the Honorable Ross Swimmer, Assistant Secretary for Indian Affairs, U.S. Department of the Interior, and the Director of Indian Health Services, Dr. Everett Rhoades.

Gentlemen, as always, you are welcome here. Mr. Swimmer, please proceed.

[The opening statement of Senator Inouye, and S. 1703 follow:]

OPENING STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

Good morning and welcome to this hearing of the Committee on Indian Affairs regarding S. 1703, a bill to amend the Indian Self-Determination Act. Today we will hear the views of administration witnesses regarding these amendments. We also have a panel of witnesses to expand on the tribes' point of view on the matters of indirect costs, Federal tort claims coverage, and nonprocurement contracts.

The Indian Self-Determination Act is unique in that it requires Federal agencies to continue providing direct services until such time as tribes freely choose to contract to operate those programs. At that point, the Federal agencies are required to transfer resources and control over those programs to the tribes.

No other Federal agency is required to assist another governmental entity and simultaneously to divest itself of its own resources. In this sense, the act contradicts all known laws of organizational behavior. We recognize that implementation of the act has not been easy for either the tribes or the Federal agencies.

In addition, tribes and the Federal agencies have attempted to implement this Federal policy during a period of tremendous competition among various Federal priorities, and during a period of budgetary constraints. As a result, there have been problems with funding for tribal indirect costs and for Federal costs for contract monitoring and personnel.

We have approached the development of these amendments with the philosophy that the tribes, the Bureau of Indian Affairs and the Indian Health Service must work together to increase the success of the Federal policy of Indian self-determination. We have attempted to address some of the concerns of the Federal agencies regarding transfer of property to tribes, extending the time period for consideration of contract applications, and making permanent the protection of Federal personnel benefits for BIA or IHS staff who choose to work with tribes. We are open to further suggestions to making this law work better not only for tribes, but also for the BIA and IHS.

We recognize there has been tremendous progress made over the past twelve years. The Bureau of Indian Affairs has over 1,400 contracts with tribes, totalling approximately $280 million, or 25 percent of the BIA budget. Tribal contracts with the Indian Health Service include the operation of 6 hospitals and 300 outpatient clinics, as well as many community health programs.

Our purpose here today is to explore ways to improve the Federal policy of Indian self-determination. I look forward to your comments and recommendations.

100TH CONGRESS
1ST SESSION

S. 1703

To amend the Indian Self-Determination and Education Assistance Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18 (legislative day, SEPTEMBER 17), 1987

Mr. EVANS (for himself, Mr. INOUYE, Mr. MCCAIN, Mr. BURDICK, Mr. DECONCINI, Mr. MURKOWSKI, Mr. DASCHLE, Mr. DOMENICI, Mr. HATFIELD, Mr. PACKWOOD, Mr. COCHRAN, Mr. HECHT, and Mr. BINGAMAN) introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

---

A BILL

To amend the Indian Self-Determination and Education Assistance Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—ADMINISTRATIVE PROVISIONS

SEC. 101. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be referred to as the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

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TITLE I—ADMINISTRATIVE PROVISIONS

Sec. 101. Short title and table of contents
Sec. 102. Declaration of Policy
Sec. 103. Definitions
Sec. 104. Reporting and audit requirements

TITLE II—INDIAN SELF-DETERMINATION ACT AMENDMENTS

Sec. 201. Self-Determination Contracts
Sec. 202. Technical Assistance and Grants to Tribal Organizations
Sec. 203. Personnel
Sec. 204. Administrative Provisions
Sec. 205. Contract Funding and Indirect Costs
Sec. 206. Contract Appeals
Sec. 207. Savings Provisions
Sec. 208. Severability

SEC. 102 DECLARATION OF POLICY.

Section 3 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by striking existing subsection "(b)" and inserting the following new subsection "(b)" in lieu thereof:

> "(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy the United States is committed to supporting and assisting

Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.".

SEC. 103. DEFINITIONS.

Section 4 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by adding the following new subsections (a), (b), (c) and (d):

"(a) 'construction programs' means programs for the planning, design, construction, repair, improvement, and expansion of buildings or facilities but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities;

"(b) 'contract costs' means all direct and indirect costs which are necessary and reasonable for the proper and efficient administration of self-determination contracts;

"(c) 'contract funding base' means the base level from which contract funding needs are determined, and includes all contract costs;

"(d) 'direct program costs' means costs that can be identified specifically with a particular contract objective;";

(b) by redesignating existing subsections "(a)" and "(b)" as subsections "(e)" and "(f)" respectively;

(c) by adding the following new subsections (g), (h), and (i):

"(g) 'indirect costs' means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved: *Provided*, That indirect costs are determined by multiplying the amount of direct program costs by the indirect cost rate for such contract;

"(h) 'indirect cost rate' means the rate arrived at through negotiation between an Indian tribe or tribal organization and the cognizant Federal agency;

"(i) 'mature contract' means a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organization;";

(d) by redesignating existing subsection "(c)" as subsection "(j)";

(e) by striking existing subsection "(d)" and by redesignating as subsection "(k)" and inserting the following new subsection in lieu thereof:

"(k) 'Secretary', unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;";

(f) by adding the following new subsection "(l)":

"(l) 'self-determination contract' means an intergovernmental contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That no intergovernmental contract shall be construed to be a procurement contract; and"; and

(g) by redesignating existing subsection "(f)" as subsection "(m)".

SEC. 104. REPORTING AND AUDIT REQUIREMENTS.

Subsection (a) of section 5 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by inserting after the words "as the appropriate Secretary shall prescribe," the following: "by regulations promulgated under the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237, as amended), consistent with section 102(d)(5) of this Act,"; and

(b) by changing the period at the end of the subsection to a colon and inserting the following proviso: "*Provided, however,* That for the purposes of this subsection, such records for multi-year contracts shall consist of quarterly financial statements for the purpose of quarterly advance payments, the annual single-agency audit required by the Single Audit Act of 1984 (Public Law 98–502, Act of October 19, 1984, 98 Stat. 2327), and a brief annual program report.".

TITLE II—INDIAN SELF-DETERMINATION ACT AMENDMENTS

SEC. 201. SELF-DETERMINATION CONTRACTS.

(a) Section 102 of the Indian Self-Determination and Education Assistance Act (Public Law 93–638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended to read as follows:

"SEC. 102. (a)(1) The Secretary is directed, upon the request of any Indian tribe or tribal organization, to enter into a self-determination contract or contracts with such

Indian tribe or tribal organization to plan, conduct, and administer programs, including construction programs, or portions thereof—

"(i) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act;

"(ii) any program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

"(iii) any or all of the functions, authorities, and responsibilities of the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

"(iv) any program or portion thereof, including construction programs, administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

"(v) any program, or portion thereof, for the benefit of Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

"(2) Any Indian tribe or tribal organization may submit a proposal for a self-determination contract to the Secretary for review. The Secretary shall, within ninety days after receipt of a proposal for a self-determination contract, approve the proposal unless a specific finding is made that—

"(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

"(B) adequate protection of trust resources is not assured; or

"(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract.

"(3) Indian tribes and tribal organizations shall be entitled to contract for any program or function operated by the Federal Government for the benefit of such tribe, as provided in this section.

"(4) Upon the request of any Indian tribe or tribal organization that operates two or more mature self-determination contracts, the Secretary is authorized to allow such Indian tribe or tribal organization to consolidate such contracts into one single contract.

"(b) Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, he or she shall (1) state his or her objections in writing to the Indian tribe or tribal organization within sixty days, (2) provide assistance to the Indian tribe or tribal organization to overcome his or her stated objections, and (3) provide the Indian tribe or tribal organization with a hearing, under such rules and regulations as he or she may promulgate, and the opportunity for appeal on the objections raised.

"(c)(1) The Secretary is authorized to require any Indian tribe or tribal organization requesting to enter into a self-determination contract pursuant to the provisions of this title to obtain adequate liability insurance: *Provided, however,* That, except for liability for interest prior to judgment or for punitive damages, each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

"(2)(A) For purposes of section 224 of the Public Health Service Act (42 U.S.C. 233(a)), and chapter 171 and section 1346 of title 28, United States Code, with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under this section or section 104(b) of this Act, the Act of April 30, 1908 (35 Stat. 71; 25 U.S.C. 47), or section 23 of the Act of June 25, 1910 (36 Stat. 861; 25 U.S.C. 47), is deemed to be part of the Public Health Service of the Department of Health and Human Services while carrying out such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement.

"(B) Subparagraph (A) shall apply to an urban Indian organization, and to employees of an urban Indian organization, only with respect to services provided to Indians.".

(b) Section 103 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is hereby repealed.

SEC. 202. TECHNICAL ASSISTANCE AND GRANTS TO TRIBAL ORGANIZATIONS.

Section 104 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as section "103"; and

(b) by adding the following new subsection (d) at the end thereof:

"(d) The Secretary is directed, upon the request of any Indian tribe or tribal organization, to provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization—

"(1) to develop any new self-determination contract authorized pursuant to this Act;

"(2) to provide for the assumption by such Indian tribe or tribal organization of any program, or portion thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921, (42 Stat. 208), and any Act subsequent thereto; or

"(3) to develop modifications to any proposal for a self-determination contract which the Secretary has declined to approve pursuant to section 102 of the Act.".

SEC. 203 PERSONNEL.

Section 105 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as section "104"; and

(b) in subsection (e), by deleting the words "on or before December 31, 1988".

SEC. 204. ADMINISTRATIVE PROVISIONS.

Section 106 of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by redesignating such section as "105";

(b) by changing the period at the end of existing subsection "(a)" to a colon and adding the following new proviso at the end thereof: "*Provided further*, That the Office of Federal Procurement Policy Act (Public Law 93-400, Act of August 30, 1974, 88 Stat. 796) and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contract.";

(c) by stiking existing subsection "(c)" and inserting the following in lieu thereof:

"(c) Any self-determination contract requested by an Indian tribe or tribal organization pursuant to section 102 of this Act shall be for a term not to exceed three years in the case of a new contract, and for a term not to exceed five years in the case of a mature contract unless the appropriate Secretary determines that a longer term would be advisable: *Provided*, That the amounts of such contracts shall be subject to the availability of appropriations: *Provided further,* That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of an Indian tribe or tribal organizations.";

(d) by striking existing subsection "(d)" and inserting the following in lieu thereof:

"(d) Whenever an Indian tribe or tribal organization requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective upon a date specified by the appropriate Secretary not less than one year from the date of the request by the Indian tribe or tribal organization at such date as may be mutually agreed to by the appropriate Secretary and the Indian tribe or tribal organization.",

(e) by striking existing subsection "(e)" and inserting the following in lieu thereof:

"(e) In connection with any self-determination contract or grant made pursuant to section 102 or 103 of this Act, the appropriate Secretary may—

"(1) permit an Indian tribe or tribal organization in carrying out such contract or grant, to utilize existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within his jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance;

"(2) donate to an Indian tribe or tribal organization the title to any personal property found to be in excess to the needs of the Bureau of Indian Affairs, the Indian Health Service, or the General Services Administration, including property and equipment purchased with funds under any self-determination contract or grant agreement; and

"(3) acquire excess or surplus Government property for donation to an Indian tribe or tribal organization if the Secretary determines the property is appropriate for use by the tribe or tribal organization for a purpose for which a self-determination contract or grant agreement is authorized under this Act."; and

(f) by striking existing subsection "(h)".

SEC. 205. CONTRACT FUNDING AND INDIRECT COSTS.

Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended by adding the following new section 106:

"SEC. 106. (a) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act—

"(1) shall include all contract costs incurred by such Indian tribe or tribal organization in connection with such contract;

"(2) shall not be reduced to make base funding available for any new self-determination contract;

"(3) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

"(4) shall not be less than the appropriate Secretary would have otherwise provided for direct operation of the programs or portions thereof for the period covered by the contract: *Provided,* That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract;

"(5) shall not be reduced by the Secretary in subsequent years except by a reduction in Congressional appropriations from the previous fiscal year for the program or function to be contracted;

"(6) shall not be reduced by the Secretary to pay for Federal functions, including but not limited to Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring; and

"(7) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract.

"(b) The Secretary of Health and Human Services and the Secretary of the Interior shall provide an annual report in writing to the Select Committee on Indian Affairs and the Committee on Appropriations of the United States Senate, and to the Committees on Interior and Insular Affairs and Appropriations of the United States House of Representatives, on the implementation of this Act. Such report shall include—

"(1) an accounting of the total amounts of funds provided for each program or function for direct and indirect costs for new and mature self-determination contracts: *Provided*, That in the annual budget justifications the amounts of funds provided to Indian tribes and tribal organizations under self-determination contracts shall be reported for each program, line-item, activity or element and shall be reported separately from amounts for Agencies, Service Units, Area Field Operations and other Federal functions;

"(2) an estimate of the actual obligations of Indian tribes and tribal organizations for direct and indirect costs for self-determination contracts;

"(3) the indirect cost rate and type of rate for each Indian tribe or tribal organization negotiated with the Department of the Interior Office of Inspector General;

"(4) the direct cost base and type of base from which the indirect cost rate is determined for each Indian tribe or tribal organization;

"(5) the indirect cost pool amounts and the types of costs included in the indirect cost pools;

"(6) activities of the Department of Health and Human Services and the Department of the Interior in assisting Indian tribes to establish and administer indirect cost systems;

"(7) a list of requests for technical assistance made by Indian tribes and tribal organizations made pursuant to section 103; and

"(8) any findings and recommendations regarding needed improvements in the system of indirect cost funding.

"(c) For purposes of determining indirect cost rates in subsequent fiscal years for Federal programs that provide funding to tribes, other than the Bureau of Indian Affairs and the Indian Health Service, and which have statutory limitations on indirect cost reimbursements, Indian tribes and tribal organizations shall not be held liable for the difference between the amounts actually collected, and the amounts that would have been collected at one hundred percent of their indirect cost rate.

"(d) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A–87, incurred for fiscal years prior to fiscal year 1988.

"(e) The Secretary shall give notice of any disallowance of costs within three hundred and sixty-five days of receiving any required audit report and shall provide for an appeal and hearing to the appropriate officials on any such disallowance. Any right of action or other remedy relating to any such disallowance shall be barred unless notice has been given within the designated period.

"(f) At least ninety days prior to removing any program from the Indian Priority System, the Secretary of the Interior shall publish in the Federal Register a notice of intent to remove or alter any program in the Indian Priority System, and provide a statement of the impact on base funding levels for each Agency and tribe affected.

"(g) Upon the approval of a self-determination contract and at the request of an Indian tribe or tribal organization, the Secretary shall add the indirect cost funding amount awarded for such contract to the amount awarded for direct program funding for the first year and, subject to adjustments in the amount of direct funding available for such contract, for each subsequent year that the program remains continuously under contract. Such combined amount shall be carried in the contracting agency's budget at the specific budget location of the contracted program for as long as the contractor continuously contracts such program.".

SEC. 206. CONTRACT APPEALS.

Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, as amended) is further amended—

(a) by adding the following new section 110:

"SEC. 110. (a) Federal district courts shall have original jurisdiction concurrent with the Court of Claims, of any civil action or claim against the appropriate Secretary arising under this Act or under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any Agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

"(b) No self-determination contract may be modified unilaterally by the United States. Self-determination contracts may be modified only—

"(1) at the written request of a tribe; or

"(2)(A) if the Federal agency states in writing the reasons for the proposed contract modification and provides this written notification to the tribe ninety days in advance of the proposed effective date of modification; and

"(B) the tribe is afforded the right to appeal the proposed modification through the Department of Interior Board of Contract Appeals, or through the Department of Health and Human Services Board of Contract Appeals.

"(c) The Equal Access to Justice Act (Public Law 96–481, Act of October 1, 1980, 94 Stat. 2325, as amended) shall apply to administrative appeals by Indian tribes and tribal organizations regarding self-determination contracts.

"(d) The Contract Disputes Act (Public Law 95–563, Act of November 1, 1978, 92 Stat. 2383, as amended) shall apply to self-determination contracts."; and

(b) by redesignating existing section "110" as section "111".

SEC. 207. SAVINGS PROVISIONS.

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to Indian people.

SEC. 208. SEVERABILITY.

If any provision of this Act or the application thereof to any Indian tribe, entity, person or circumstance is held invalid, neither the remainder of this Act, nor the application of any provisions herein to other Indian tribes, entities, persons or circumstances shall be affected thereby.

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. **Swimmer**. Thank you, Mr. Chairman.

I appreciate this opportunity to give the committee my views on the Public Law 93-638 process and recommendations that might be able to make to the committee in easing the present statutory and regulatory burden on the tribes and contracting.

I have a statement I would like to submit for the record, and then generally summarize my remarks.

The **Chairman**. Without objection, all of the statements of witnesses will be made part of the record in total.

Mr. **Swimmer**. I also offer my apology to the committee. I understand the difficulty in getting the statement late, and I certainly share your concern. I might add that we at the policy level sometimes have the same problem. We got our statement fairly late, and the only excuse I could make is that we just didn't start in time, and then unfortunately had some clearances we thought wouldn't take as long as they did.

I've had personal experience with Public Law 93-638 on both sides of the table. I recall in 1975 as a tribal leader when Public Law 93-638 became a law, many of the Indian meetings I attended had speeches made that suggested that this was simply a way for the Federal Government to get out of its responsibility to Indians and that termination would surely follow in not too many years. I was one of the skeptics at the time as to whether Public Law 93-638, self-determination really made any sense and whether it would work, or whether it was simply going to be a transfer of Federal dollars to Indian tribes that would then suffer the axe of the budget process.

I will say that during my subsequent years as the Chief of the Cherokee Tribe, I found the opposite to be true. And that in fact there was a tremendous desire, certainly from the Washington level of both agencies, Indian Health and BIA, to transfer the operation of Federal responsibilities over to tribes so that they could be operated by the tribes and indirectly, at least, strengthen tribal government, and assist the tribal governments in developing, continuing to develop their administrative systems. And that in fact instead of reduced budgets, the budget continued to grow. And the budget grew through the 1970's and 1980's and has leveled off in our agency at about a billion dollars.

I'm pleased to say that we have in fact contracted nearly $280 million, a little over that, to Indian tribes. It has not been without substantial difficulty. And as the Chairman noted, it simply isn't the government way of doing things. And I have had long conversations, now that I've been on this side of the table, with area and agency staff people who are caught in the dilemma of being successful in contracting out the duties of their agencies and then facing a downgrade or a loss of position because of that success.

I don't know exactly how to address that, but I suggest that in the original drafting there were not sufficient incentives to encourage bureaucrats to give up some of that personal benefit in order to help the tribes, or for the tribes to enter into these contracts and assume that responsibility. I believe we need to take a look at that area and determine what we are going to do to create an atmosphere of willingness on both sides.

My suggestion, in addition to some specific ideas, is that we at the agency level be given some additional time, the recommendations from others in the administration, including OMB, have been 6 weeks, to see if we couldn't draft maybe a refined bill, or a different bill to 638 entirely, that would substantially ease the process of moving from Federal agencies, over to tribes that Federal responsibility and Federal action. I think I would have to admit that would be an ambitious schedule, but I think that the committee is certainly on the right track. You understand a lot of the inhibitions now plaguing us in trying to make 638 work, there are some practical things that need to be addressed and perhaps a bill could be written that would make the process a simple transfer of functions, instead of a procurement contract process that is done with other agencies.

One of the problems that I believe we face, if you could document all of the issues that tribes bring forth, is with the fiscal year. I would guess—now I haven't done any research—but I would just guess based on the complaints I've heard in the last several weeks from tribes, that 50 percent or more of the complaints about Public Law 93-638 arise in connection with the end and the beginning of the fiscal year.

To give you an example, we're in a position right now where we're under a continuing resolution for a specific period of time. We cannot obligate any moneys beyond November 18. That's approximately 11 percent of the next fiscal year. So our directives to all of our offices have been, do not obligate more than 11 percent. The tribes, then, are going to be told, your budget for all of these contracted programs, $280 million worth, is 11 percent. It's extremely difficult for a tribe to do planning or to make purchases. If they had a big expenditure up front that would eat up all of the 11 percent now they would not have money for personnel. But we cannot, under our current system, go beyond that 11 percent until the CR is continued or an appropriation is made.

A thought came to mind. Maybe if we went calendar year so we could go over this hiatus that happens each year to us. Usually by the end of the calendar year, by January 1, we have a pretty good idea of the appropriation process and where we are. I recognize other implications, however. I just throw it out as saying that it is an impediment.

We have a serious problem with the Inspector General and the way in which the indirect cost rates are negotiated, and the timeliness of those rates. Last night I received a final report from the Inspector General regarding a study that was done of indirect cost rates, and I was very surprised at some of their findings—final conclusions. We answered some of the issues in a draft that we received some time ago. My personal experience, however, back in the tribal days was that we constantly had to work to get the IG available to us to negotiate. I'm told now by a number of tribes that we're months behind, that we're going into the new fiscal year without having the rates negotiated because of the manpower available. We need a simplified formula for contract support. I've suggested flat fee.

In looking at the Inspector General's report, it looks like 30 percent might be the right number. I don't know what the right number is, but we've received a lot of documentation from tribes. If it's not a flat fee, a formula that's simplified of some kind that would take us out of the negotiation process of trying to jockey our costs up on the front end, and convince the IG or us, or somebody that we have this much money and then at the end of year finding out that we're short and then have to over-recovery or under-recovery and all that. The present system lends itself to a tribe increasing its overhead. That's the only way the tribe wins, by increasing its overhead. And the more overhead, the bigger the computers are, the more people they can hire, the bigger the indirect cost rate, the more money a tribe, gets.

I think it's counterproductive. I don't believe we should penalize a tribe. We should work to find that happy medium, if we can, of what is necessary to operate this Federal function that is being transferred. It's not a CETA grant, a HUD grant. It's not something from the Department of Defense where you have typical indirect cost negotiations, profit and loss. We're transferring a Federal function from an Federal agency to another government. We're asking that government to operate that Federal responsibility on our behalf. The same kinds of costs, the same kinds of overhead don't necessarily apply.

Removing the contracts, as is suggested in the bill, from procurement system is only part of the answer. It's not the purchase of goods, or it's not even the acquisition of a community development block grant from HUD. It is simply a transfer function. And we shouldn't have it in the procurement mode. And it shouldn't even be called a contract, in my opinion. It should be simply a transfer of authority. And there should be minimum oversight. Tribes could set forth what they expect to do with this budget that they're going to get. We monitor and have an annual audit.

The tribes must have more flexibility in the spending of this money. Because we operated a list of programs, doesn't necessarily mean that those are all valuable on the reservation. It's quite possible that the tribe would rather emphasize something totally different. And it's my opinion that the tribe should have that kind of flexibility, as far as our programs are concerned. I think Dr. Rhoades certainly has a different situation. Obviously, you're not going to give a tribe money to operate a clinic and then have them set up a law enforcement program. But we operate many, many different kinds of programs. And many of those, I think, lend themselves to the need for greater flexibility of moving the money around.

I want to emphasize again, that it is simply a matter of the tribes carrying out our Snyder Act, Federal responsibility. We're not trying to give that up. We still would retain the Federal responsibility, and because we have tribes that are in serious financial and administrative difficulties, unfortunately I can't recommend that we just turn over all of the money to all of the tribes. There has to be some residual for a period of time where the Bureau of Indian Affairs retains capability to step in and help operate a tribe and the tribal government. We have that situation presently with a couple of tribes, one very large and one fairly small. But I would like for us to see the day when the Bureau of Indian Affairs could literally step out of the picture and put the budget with the tribes and let them carry out the responsibility that they believe is in the best interest of what's going on on that reservation.

As I said, in my statement, there's attached to it an addendum that contains specific recommendations, if the proposed legislation is to go forward. But I think that we certainly can live with that legislation with some of the amendments that we've proposed. I would still recommend further work by the committee and giving us some additional time, perhaps to sit down with the committee and see if we can't put our heads together and maybe come up with some alternative, at least in the Bureau programs. Maybe we need to think about a different kind of operation between us and Indian Health Service. We find the same thing to be true in our budget with education, for instance. That where we operate a fairly large $200 plus million program, and it's a single kind of activity like education it lends itself much easier to certainty than when we're dealing with 20 or 30 different line items, all the way from law enforcement to child welfare, to general assistance, and employment assistance and housing, and all of that. It's extremely complicated once we start mixing all of those kinds of programs together. And it sometimes doesn't lend itself to a quick fix kind of thing.

So with that I appreciate the committee's time and would be happy to answer questions now, or after Dr. Rhoade's testimony.

[Prepared statement of Mr. Swimmer appears in the appendix.]

The Chairman. At the outset, I would like to advise you, if you haven't heard, that we have scheduled a markup of this measure for October 21. But being aware of your concerns and your desire to have a greater input in the final outcome of this measure, even if the markup is held on October 21, I can assure you that if it is reported to the Floor, it will be held until mid-November. This should give you and the staff sufficient time to get together. And if you feel that amendments of clarification would be appropriate, we can resolve that on the Floor.

Mr. Swimmer. Thank you.

The Chairman. Second, can you tell us how you reached this 15 percent?

Mr. Swimmer. It was a number that was arrived at before I came on board. In addition to that it was a number that I looked at several tribes' operations to see what their current rates were. The second largest tribe in the country had an indirect cost rate of around 12 percent. Navajo, the largest I believe, last year's was 15 percent.

I looked at many of the smaller tribes operations and found some without any indirect costs. They didn't draw down indirect. They were using what's called self-determination money to operate the administrative side of the government. I found some that had rates that exceeded 40 and 50 percent. The study that was done, various studies none of which I consider to be state of the art type studies, but reviews done within our own budget shop, indicated that the

Bureau's overhead was somewhere between 12 and 20 percent. Nobody could pin it down, but 15 looked as good as any.

I often say that my mistake was that in addition to the flat fee, I suggested a number. If I had left the percentage out maybe I would have had more cooperation on establishing the number. But that was the intent. It was not the idea that 15 percent was right or wrong. It was an effort to establish a fixed number that perhaps could be determined after substantial review with the different tribes and find out what that right number is. And it may even be that it would have to be a scale, say tribes under $10 million would have a rate of 20 percent; over $10 million, 15 percent; over $50 million, 10 percent. But I just contended that if we could eliminate the pre-audit, the post-audit and all of the negotiations which are extremely expensive it would be better. I know in our tribe alone, I estimated the cost of negotiating rates with the Inspector General in doing the pre and post audits was anywhere from $50 to $75,000 a year. If we could eliminate some of those costs and go to a simplified system and could agree on the fairness of it, that it would mean a tremendous amount of benefit to the tribes. I believe we need a system that would not be a payback or an over/under recovery, that if we could set up an incentive system that would allow tribes to keep whatever that amount was and use it for programs, or use it for tribal government. But there would be a balancing within the tribe, an incentive, if you will, to save administrative money instead of build a huge bureaucracy that's going to spend more money in order to attract a greater percentage.

The **Chairman**. Does the Navajo's 12 percent also include the cost of insurance?

Mr. **Swimmer**. I believe Navajo, I said, was around 15 percent last year. I'm not sure that it does. All I know is that whatever the indirect cost rates are that are negotiated, generally insurance is included in that I believe, as one of the items that is negotiated.

They contract over $100 million from us.

The **Chairman**. You spoke of a tribe with no indirect costs. I can't quite imagine that.

Mr. **Swimmer**. Well, what they did. These were some Pueblos and they were receiving a—what we called a self-determination grant. The self-determination grants were originally part of Public Law 93-638 to help tribal governments achieve a certain level of operation. If the Government didn't have an accounting system, for instance, the tribe would be given a grant to develop an accounting system, or a personnel system, or whatever is needed.

In some cases what I was told is that the cost of having to negotiate, and the difficulty of negotiating indirect costs was such that the tribe—they had small contracts anyway—simply supported itself, it's tribal overhead, with its self-determination grant. I don't believe it was intended to be a continuing grant, but it turned out to be that way. And so they would receive a few thousand dollars each year, and that's what they would pay their travel and administration with.

One of the concerns with our flat fee proposal was that some of the tribes were concerned that if we went with a flat fee that it would give tribes money that didn't have rates, or it might reward a tribe that was at a lesser rate than what was being proposed. But

I contend that any tribe that is operating one of our programs should have enough overhead money allocated to it to help defer the actual cost of operation. And again because of the cost of negotiating those rates, some tribes, especially the smaller ones, simply don't do it.

The **Chairman**. The committee inquired with the Office of Management and Budget [OMB] as to the practice in other agencies. We have been advised that in all other Federal agencies, other than BIA, there's a special contract office, or some contract specialists, responsible for negotiating contracts. And then they have another office, call it what you may, the auditing office or the Inspector General, that does the auditing. They are separate entities. In your operation you have one office that does both. And the question of conflict of interest comes up.

I would like to know what your justifications are in maintaining one office to carry out two functions, two different functions?

Mr. **Swimmer**. We require an independent audit. We do not do the audits of the tribal 638 grants. We do negotiate the contracts. It's really not a negotiation. The law simply provides that the tribe is entitled to receive the same amount of money that the Bureau of Indian Affairs is currently spending on that particular activity. So in the Public Law 93-638 type programs, we simply transfer, generally, those funds over to the tribe when they execute a contract with us.

The negotiations that go on around that mainly involve all of the procurement regulations that we have to go through in determining how the money is spent, the kind of reporting to be done, and what-have-you.

On the other end of it the tribes are required, under the OMB Circular, to have their auditing done by an outside firm. And they submit those audits to us. Now, we have the ability to call on the Inspector General and do independent audits of tribes, also. But our function is only one of monitoring during the contract term.

The **Chairman**. But your office also monitors and sets the standard for the auditing doesn't it?

Mr. **Swimmer**. I don't believe so. I might not be understanding exactly what—this is Hazel Elbert who has joined me at the table, who is the Deputy primarily in charge of this section of our budget. But she informs me that the Inspector General sets the standards for the audits, and for the auditing, determines what the independent auditor will evaluate. We do not do that as a program matter.

The **Chairman**. As you may have noted, we just got a call to go vote. I will have to report to the Floor. But since we were not able to get your statement in a timely fashion, we were not able to study it. So with study we would like to submit to you questions to which we hope you will respond.

Mr. **Swimmer**. Certainly.

The **Chairman**. And if I may at this time, I would like to call a short recess to respond to the call.

Mr. Secretary if you are busy and you have to return to your office, this may be a good time, sir.

Mr. **Swimmer**. Thank you.

[Recess.]

The **Chairman**. The hearing will please come to order.

Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

Unfortunately, Mr. Swimmer, I wasn't able to be here for your testimony, but I would follow one line of questioning. It seems to me from reading your testimony that some of the difficulties you point out right at the very beginning lies in the intricacies in which we have found ourselves in the whole contracting process.

What's your view of the history of all of that? Why have we veered so far from, as you put it, a clear statement of President Nixon more than 10 years ago? How are we getting ourselves so bound up in conflicting and probably unnecessary regulations?

Mr. SWIMMER. I think it was something that was so unique and innovative at the time in the Federal Government system that once the law had been passed and given to the agency, there really wasn't a mechanism to deal with it. And so the term, contract, was added to the whole concept of self-determination. And once that term had been added, it was followed with the idea that there were to be somehow procurement contracts.

The intent, as I understood it at the time, was that really it was to be a Federal responsibility, a Snyder Act responsibility of the Federal Government to Indian tribes, and that responsibility would be exercised by the Indian tribe. And that moneys through self-determination grants, and what-have-you, would be made available to Tribes to establish governments where there weren't any, and develop accounting systems. But then when it got moved over into the contracting mode, many, many pages of regulations developed around that. And we were boxed in, and have been sort of boxed in over the years, to treat these transfers of functions just like we would treat a HUD contract, or an application for a CETA grant, or any number of other things the Federal Government makes available in the normal course of business. But that wasn't the way these functions were supposed to be operated.

And so I think that when we got it tied up in the procurement law and all, that it created those obstacles. And one other obstacle that I mentioned earlier that it created was that no one seemed to consider the impact on the personnel of the agency. There were some provisions to extend, and your bill provides an extension of this, some of the benefits of the Federal employee, and allow that to be continued. But beyond that, for instance in the case of an agency superintendent who has successfully contracted out his agency, the most we can offer him besides maybe a pat on the back and a good rating, is a downgrade. He actually loses money because of that contracting out. I don't believe there were sufficient considerations given to the incentives of how this program would work. And certainly it did get tied up in the contract/procurement type procedures that I don't think are necessary to make it an effective program.

And then, of course as I mentioned earlier too, it got tied up in the fiscal year funding situation, so as now we're locked into allocating to tribes only a small percentage of their money for next year. And it makes it difficult to operate going into the fiscal year knowing that you only have 11 percent of the money that you had last year. So it's all——

Senator Evans. I don't think you can be blamed for that. I think that's our processes up here that have caused us to be extraordinarily late in finishing our appropriation and budgeting process. And it makes it impossible for you to know what's going to happen.

Mr. Swimmer. One idea I suggested, that I don't think would have a budgetary effect, that I frankly don't know how it would look on paper, but it would be a calendar year, because this experience has been continuing, so that maybe if we could do the transfer renewals on a calendar year it might get us over this glitch that generally happens.

Senator Evans. Do you have, in working out your proposals, this veers a little from the questioning I want to follow, but in working out those budgetary proposals given the fact that we haven't finalized anything yet and won't probably for another month, you work on the basis of the President's request rather than on the basis, say, of prior year appropriations, which probably at least from history is likely to be a more accurate view of what's going to be available in the President's request? Are you required or constrained by the Office of Management and Budget or by the Administration from above somewhere to use the President's request even at this late date, or preparation of these estimates for next year?

Mr. Swimmer. I believe so, but let me double check that.

I'm told that we would live by the language in the Continuing Resolution which would be the lower of the House or the Senate.

Senator Evans. I understand that, but——

Mr. Swimmer. We would not be further constrained.

Senator Evans. The Resolution hasn't passed yet, and so at this point even though we're already into the new fiscal year, Continuing Resolution, other than the temporary one, hasn't passed. Are you now at the point where you're basing, or would change the basis of your negotiation to the Continuing Resolution now in effect rather than the President's request?

Mr. Swimmer. Yes.

Senator Evans. But you don't do that until a Continuing Resolution has actually passed?

Mr. Swimmer. That's right.

Senator Evans. So is that a requirement laid on you by the Office of Management and Budget, that you cannot use as a base point the prior year appropriation, but instead must use the budget request of the President?

Mr. Swimmer. OMB does set the basic guidelines for us to use, and there's a little confusion on it, but I guess for planning purposes, we would use the President's budget for the Continuing Resolution purposes we'll probably end up using the lower of whichever number it happens to be, whether it's the President's budget or the CR.

Senator Evans. And then when the final appropriation act is passed, you of course use that?

Mr. Swimmer. Then we would make the adjustments. And of course, often times they're substantial.

Senator Evans. And the problem is that we end up—no wonder it's confusing out there because you end up with three different levels of planning then?

Mr. SWIMMER. At least.

Senator EVANS. One, the President's level, and then the lower of the two and then the final one.

If you were to start by stripping away everything that has been done both through regulation and subsequent law to President Nixon's statement on what he thought the relationship ought to be, how would you redraw it? What would be an appropriate, in your view, what would be an appropriate way to cut through the thicket we have now built for ourselves? Does it require just change in regulation? Does it require change in law as well? That's really what we're aimed at here in this proposal.

Mr. SWIMMER. It would probably require of new legislation, a substantial change so that we don't get bogged down in the regulatory process, once whatever law is passed.

I suggest something that would be, as I would style it, a transfer of authority or a transfer of function, or a delegation of function, or call it something besides a contract to start with. And then have it more in the nature of a—I use the word grant, but I use it cautiously, because it connotes something to Indian tribes that I don't mean—but an ease of transfer of the Federal dollars. The Federal responsibility—our agencies are different than all other agencies in government. We're bound by Snyder Act and subsequent laws and treaties, and we have certain Federal responsibilities that we carry out on behalf of Indians. And what we're doing is simply transferring those operations over to an Indian tribal government to carry out. And it shouldn't be anything more than that.

The responsibility will always remain, and that's the point I want to emphasize, that we're not turning over responsibility or abdicating responsibility, which many of the tribes think might happen. But if we could have an ease of process that would allow us to grant the money to the tribes at the appropriate level that's been determined by Congress as the appropriated amount, and require a minimum reporting with an outside agency, perhaps, or an agreed auditing firm doing a programmatic audit and then a fiscal audit at the end of the year, and minor monitoring.

The point that makes a bill a little more difficult and it has but I think could be worked out, is that we must retain an ability to perform those functions. So that if a tribe actually fails to perform, or chooses not to perform those functions, the Bureau of Indian Affairs still must be in an action mode to go onto that reservation and perform those functions, such as law enforcement or otherwise. So there is going to remain an overhead problem within the Bureau, a program commitment within the Bureau that maybe excess to our needs, but I still believe that maybe there are ways of balancing that a little better.

One provision that has been suggested in the amendments is on retrocession, that it would be a year instead of 90 days, which gives us a chance then to gear up and do the program if need be. I think that given a few more weeks that with what your staff has worked out with tribal leadership, if we can meet with your staff and could work together, maybe we could come up with this simplified legislation and avoid the multi-pages of regulations that are there now.

Senator EVANS. I hope we can do that. I understand before I arrived, you talked about 6 weeks. I hope we can do that in something considerably less than that, or at least work toward that. I think Mr. Chairman's current schedule is for an attempt to have a markup on October 20.

The **Chairman**. I announced that we will have the markup on the 21st, with the assurance that this matter will not be voted upon by the Senate before the middle of November.

Senator **Evans**. So there are two stages. Obviously we'd like to get legislation in as good a shape as we can before we pass it out of committee. There will be a chance after that, of course, for further perfection, but we do hope that you'll have a chance to work with the staff and with the tribal leadership.

Mr. **Swimmer**. Very much so, and some of the other witnesses here today may have some input into that. But I'm looking, as much as anyone else, for answers. And welcome all the help.

Senator **Evans**. Thank you, Mr. Chairman.

The **Chairman**. Senator McCain.

Senator **McCain**. Thank you, Mr. Chairman, and thank you for holding this hearing today, and thank you for appearing, these two very important witnesses that I've had the privilege of dealing with now for some period of time.

Mr. Swimmer, on the subject of the audit of methods of reimbursing Indian organizations for indirect costs incurred, I know you're familiar with that study that was done by the President's Council on Integrity and Efficiency, and you made a response to that report. And in your response you state, since contractors have the opportunity to meet 100 percent of their indirect cost rates from the funding provided under the total contract amounts, any shortfalls for indirect costs would have to be self imposed.

I'm not sure I understand your logic in that statement, given that I think it's very clear that there has been a shortfall in funding for overall programs. So if we fund each one of them to 100 percent, then you either don't have enough money for some entirely, or you're left with some indirect costs that have to be funded. I'm not sure what you mean by self imposed.

Mr. **Swimmer**. Well, I think what is meant there is it's really a choice of the tribe, and if they actually do not have the funds to operate the administrative costs involved in the program that they could dip into program funds. But your conclusion would be right that conceivably that means that there would be less program dollars and more administrative dollars.

Some tribes have chosen to do that. Some have lived with the appropriations that we were able to give to them. And in most cases that has not been at 100 percent level of the indirect costs. So there have been adjustments by the tribe in the program. We're suggesting that they could dip into the program if need be to meet their indirect cost needs.

Senator **McCain**. But I think you would agree that not without some sacrifice of some kind given, I think, that we are in agreement, that there has been a shortage of funding. I'm not blaming that entirely on the Executive Branch, the Congress does still have control of the powers of the purse.

Mr. **Swimmer**. There might be some value in combining the two some way and letting the tribe use what it needs to for its overhead, technical overhead versus program direction and that kind of thing.

But there definitely has been less money than what was negotiated as far as indirect cost rates because of the budget constraints.

Senator McCain. Thank you.

While you're here, are we going to see a resolution of the Pascua Yaqui constitution problem soon, I hope?

Mr. Swimmer. Well, I certainly hope so. It's one of our more trying problems right now and we are hopeful that we'll have an ability to have a government and operate Federal programs.

Senator McCain. Well I think that some of the events that have taken place are very unfortunate and I hope that we can get it resolved as soon as possible, because the prospect of many of those programs being suspended can cause, I think, great difficulties for it's tribal members.

Mr. Swimmer. Yes; we would, of course, continue to operate the programs, but we're anxious to get back into a contracting mode with the Tribe.

Senator McCain. Thank you. Thank you, Mr. Chairman.

The Chairman. Mr. Secretary, in your opening remarks you mentioned the problem of personnel being displaced as a result of the diminished work load from increasing numbers of contracts. Do you have any plans, legislative or administrative, to cope with this?

Mr. Swimmer. Nothing specific, except the general concept of some incentives. It could take the form of any number of things. And some actions that are taken through our personnel system result in the ability of an individual to take early retirement, or there are some provisions where they might receive an incentive bonus, or something like that. But I just think that maybe by looking at the personnel system generally, and what happens in other cases where people are displaced for other reasons that maybe we could find some examples that might work in these cases.

It just seems to me it was something that wasn't considered and as a practical thing when the Federal bureaucrat is asked to do something that is in his own worst interest that you're going to have a block there, a psychological block, at least in trying to carry that function out.

The Chairman. I have a question, not related to anything here, but since you are before the committee today, I thought I would take advantage of this opportunity to ask you about a problem confronting the Cochiti Pueblo.

As you know, for many years the Cochiti Pueblos have been faced with this problem of the dam.

Mr. Swimmer. Yes.

The Chairman. And I note that most of the discussions have occurred with the U.S. Attorney's Office, the Corps of Engineers, and the tribe. Now the Corps of Engineers, apparently has advised the Attorney General's Office to bring this to a head by going to court instead of amicably resolving this matter.

I have looked over the facts as disclosed to me by all parties, and it would seem that in this case, the Cochiti Pueblo Indians are the unfortunate victims. The problems were not of their making. And my question is a simple one. What role is the BIA playing? Are you serving as an advocate of the Pueblos? Or are you standing back as a disinterested party? Or are you on the side of the Corps of Engineers?

Mr. **SWIMMER**. We have been serving as an advocate to the extent that we have been invited into the process. I personally toured the area from the air. I believe definitely, and our experts have told us, that the dam is a major problem out there in the way it was constructed. They apparently did not provide sufficient drains for the underground seepage. It continues to invade the reservation and from what our people tell us it eventually will go on down and cause damage even further downstream to the Cochiti.

I have visited with the Corps of Engineers, personally asking them to extend the time lines for negotiations. I found them to be somewhat intransigent on this issue. And I don't know why particularly, because on others that we've dealt with them they haven't been quite as adamant. But I do think that it's the situation that lends itself to continued negotiation. I'm advised just now that the Corps, I believe has withdrawn its demand, or its threat of action. And I would hope that they would permit us to continue negotiating this situation, because it has a potential for a substantial budget impact, of course, on the Corps, because absolutely something must be done in the form of drains, or a diversion system or something to keep the water from invading the reservation lands generally in the future.

But we very definitely, through the area office, and some personal work of mine have been advocating for the Cochiti to get the problem resolved, and would certainly be willing to work with this committee with our technical people to furnish advice, or help in any way we can to resolve it.

The **CHAIRMAN**. I hope you will serve as an advocate and call upon the Corps of Engineers to straighten up.

Mr. **SWIMMER**. I understand we have contributed funding to the study to help determine a solution to it also. I think about $40,000 has been contributed from our budget to help the tribe do this study to determine what can be done to solve the problem.

The **CHAIRMAN**. I thank you very much.

Now we call upon the Director of the IHS, Dr. Rhoades.

STATEMENT OF DR. EVERETT RHOADES, DIRECTOR, INDIAN HEALTH SERVICE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ROCKVILLE, MD

Dr. **RHOADES**. Mr. Chairman, and members of the committee, I am Dr. Everett Rhoades, the Director of the Indian Health Service. I appreciate this opportunity to testify on S. 1703, a bill to amend the Indian Self-Determination and Education Assistance Act of 1975.

I share with Mr. Swimmer a prospective which is dual in one sense. I spent a number of years dealing with Indian Self-Determination from the perspective of being a tribal council member prior to moving into a new scene of responsibility as the agent for the Federal Government in carrying out this responsibility as well. I think the general remarks made by the chairman and by Mr. Swimmer accurately depict the historical development of the self-determination process to the point where we are today. I echo those.

I have a prepared statement from which I'd like to make relatively few points for purposes of discussion. You mentioned it would be entered into the record.

There are a number of distinctive inherent elements in a health system which require special consideration, and which in some instances add to the complexity of an otherwise already complex process. For example, the Indian Health Service, which is the primary organizational entity whereby the Federal Government carries out its responsibility, as has already been enunciated by President Nixon in 1970 and President Reagan in 1983, and by the Indian Self-Determination Act itself, over the years, has developed a tripartheid system of delivering health care to Indian people.

The first element of this system is the direct delivery of health services by the Indian Health Service as an organized health care delivery system. The Indian Health Service staff operates 45 hospitals, 71 health centers and several hundred smaller health facilities and satellite clinics scattered across the United States.

The second mode of delivery is administered by the tribes basically through the impetus of Public Law 93-638, in which, as you've already pointed out in your opening statement, the tribal organizations themselves now operate six hospitals and approximately 250 health clinics.

The third mode, of course, is a substantial one also. It is the purchase of medical care by either the Indian Health Service or the tribes from private providers also serving the general population.

Public Law 93-638 provides the tribes with an option to freely choose to either take over the management of most Federal programs serving them or to retain Federal management of their programs. The tribes that choose not to take over management of their health programs from the Indian Health Service are not penalized for making that decision. We have always held a view that a tribal decision not to contract is equally an expression of Indian Self-Determination. In either case, however, I would like to emphasize a point that Secretary Swimmer has made. There is a continuing Federal responsibility for the health of Indian people which I do not believe that we should abrogate.

For example, there must remain on the government side, a mechanism for ensuring the quality of care that goes to Indian people. I want to emphasize that in making that statement, that is in no way a judgment on the quality of care that is provided by the Indian contractors. The quality of care is clearly equal to, if not superior to that of the Indian Health Service direct system generally. It seems to me that there is a residual responsibility which we must not abrogate.

Likewise the statutory authorization for a Tribe to retrocede a program, it seems to me, requires a residual mechanism for that program to be retroceded if the tribe should so choose. It is my opinion that the development of self-determination under Public Law 93-638 has in fact been successful. That is not to say that it has been either easy or without controversy or disagreements, and that it does not have a number of continuing problems that need to be addressed, and to which the committee is giving its attention.

I believe evidence that it is working is contained in the fact that as of last month, the Indian Health Service was administering approximately 400 active Public Law 93-638 contracts. The contract support provided by the Indian Health Service amounts to approximately $180 million. I believe that that is a substantial measure of progress since the bill was signed in 1975.

In more recent years we have also added Public Law 93-638 construction contracts which presently represent approximately $13 million of our construction appropriation. I would only echo what has been said, also, about the fact that an inherent requirement for tribes to assume control over a program, and I would dare say regardless of the derivation of that program, is a necessity for that tribe to have the resources that they must have in order to build a structure within that tribe to oversee and maintain the program.

This aspect of need is addressed in a number of ways. Again, part of which has already been addressed here this morning, and the difficulties and complexities of which are certainly shared in the Indian Health Service. We have, I think, aggressively pursued a series of obvious impediments in the continued transfer of responsibility to the tribes. We have set up a series of close collaborative activities utilizing Indian tribes, as well as Indian Health Service staff, to make recommendations to me about indirect costs, and how they should be set, to say nothing of how they should be met. I expect within a few weeks to have recommendations from a tribal and Indian Health Service staff working group as to recommendations regarding the most appropriate tool for the transfer of responsibility to the tribes. I don't need to go into this further. The general perception, which I share, is that the usual contract mechanism is not appropriate for this activity. We are seeking some other mechanism to carry this out.

In addition, as if all of this were not bad enough, there is another requirement, another mandate that has been placed upon the Indian Health Service in regard to the delivery of health care. It is what has come to be identified as equity in funding, equity in resources. Both at the direction of the Congress, through this very committee, other bills, and in a court case in California, the Indian Health Service is required to implement a system of the allocation of resources that will eliminate certain inherent inequities that have developed over the years.

The basic premise of this equity mechanism that we call Resource Allocation Methodology lies in a differential proportional provision of resources directed, first of all and primarily, at those Tribes or service units which have the lowest level of funding compared with their peer colleagues who have relatively better funding. Otherwise equity cannot be achieved. I think it is clear that the reaching of equity in some instances will come into and has come into conflict with the goals and objectives of self-determination. One of the concerns that we have about the bill as written, is that we believe that it will seriously interfere with the continuation of equity allocation of resources.

There are a number of provisions in the bill, if I could turn my attention specifically to S. 1703, that we believe require further consideration. As written, will not bring the remedy which everyone, including the committee, seeks, particularly for the tribes. A number of provisions in the bill appear to be directed primarily towards activities within the Bureau of Indian Affairs. As Mr. Swimmer has already pointed out, the history of the development and implementation of Public Law 93-638 has taught us that there are some activities which are more easily contracted in this case, than other activities. A single mechanism that does not have a great degree of latitude may compound certain problems.

We certainly applaud the goal of simplification and strengthening of the self-determination process. As I pointed out, we have, in the last couple of years, I think made a considerable degree of progress in that direction. I have pointed out, however, that I am concerned about provisions in S. 1703 that would seriously hamper our efforts to equitably allocate resources.

In addition, I believe that the desire to increase flexibility on the part of the tribes may, in some instances, restrict an important flexibility on the part of Indian Health Service management that requires further examination. I believe that there are provisions which provide unworkable or potentially harmful solutions to problems for which some solutions have already been developed.

For these reasons, we do not feel that we can support the bill as it is currently drafted.

A footnote to the question of the allocation of resources, as an example of the complexity in the operation of the health program, is that some of the certainties that appear to be put in place by this bill to ensure a level of funding for those tribes who are operating under contract, of necessity those resources will have to come from tribes that have elected not to contract. Hence we believe it would impose a penalty on those tribes, which as I've said earlier, I believe flies in the face of an equitable allocation of resources.

Finally, the well-intentioned desire to deal with the ever escalating costs of malpractice and liability insurance in which the bill proposes to extend a Federal Tort Claims Act provision to tribal contractors, we must oppose because we believe that it opens a vast opportunity for the extension of this responsibility to all contractors. The Department will attempt to deal with this very real problem in the formulation of future budgets by seeking to make available the resources for that cost through that process.

In closing, Mr. Chairman, I would like to underline Mr. Swimmer's point that it would be very desirable to spend more time in discussing various provisions that we believe may in fact may be harmful. And we would welcome the opportunity to continue to participate with the committee in this endeavor.

With that, I'd like to conclude my summarization of remarks and I'd be available to try to answer any questions that the committee may have.

[Prepared statement of Dr. Rhoades appears in the appendix.]

The CHAIRMAN. Thank you very much, Dr. Rhoades.

Before proceeding, I am pleased to announce that we are honored this morning by the presence of distinguished members of the Bar Association of Sweden. On behalf of the Select Committee on Indian Affairs, welcome. This committee, as you may have heard, has jurisdiction over the affairs of Native American Indians. The Native American Indians enjoy a special status in our Country, a special status of sovereignty. And this morning we are dealing with an aspect of that and we have as witnesses, the Assistant Secretary for Indian Affairs, and Dr. Rhoades in charge of the Indian Health Service. I hope that you will find our hearings interesting.

Now Dr. Rhoades, a few days ago we were called upon by tribal leaders in Alaska advising us that in their contract they found it necessary to spend over $1 million to acquire medical malpractice insurance. And by so doing, they had to deny themselves necessary moneys for direct medical care.

What is the national picture of tribes being required to purchase such insurance policies?

Dr. **Rhoades**. I do not believe that I have those figures at hand, Mr. Chairman. We are compiling that and I'd be very happy to provide that to the committee within a few days if I might.

The **Chairman**. Does your agency purchase medical malpractice insurance?

Dr. **Rhoades**. No, sir; the Federal Tort Claims Act, as I understand it, is the mechanism within the Federal government that looks after that kind of activity for Federal employees.

The **Chairman**. So therefore, you cannot fairly compare your indirect costs with the indirect costs of Indian tribes?

Dr. **Rhoades**. Yes, sir; that is absolutely correct. There are certain other factors as well that make a comparison inaccurate.

The **Chairman**. What suggestions do you have to alleviate this problem of medical malpractice insurance?

Dr. **Rhoades**. It is a very difficult problem, a National problem, one of the preeminent problems in the provision of health care in the United States. Secretary Bowen and the Department of Health and Human Services has just recently received a report, I believe, from a task force that he has empaneled to address this question. I do not know the recommendations of that group at this moment, but I believe they may be available very shortly.

The dilemma posed by the Alaskan contractors, I think, appropriately addresses the dilemma. And that is the escalating costs can only come out of the program costs as it currently exists. I do not consider myself anywhere close to being an expert on the problems of malpractice in general. I believe that the solution to the problem of liability for medical care is a National one, which the Indian Health Service, obviously, would participate in, but the solution of which lies outside our ability.

What little reading I have done about this problem suggests that other countries in the world have dealt with it much more satisfactorily than has the United States. I better not go very far into this, I don't know what the Bar Association of Sweden might have to say about it, to say nothing of the Bar Association of the United States. But if I might repeat what is very, very prevalent in the media, that we live in an extremely litigious society in this Country, and somewhere therein there lies a great deal of the solution of the problem. The immediate solution, as it applies to Indian contractors, is not so easy to solve.

The **Chairman**. Dr. Rhoades, in your opening remarks you cited the great numbers of contracts, 638 contracts, the IHS has with tribes. How many have been retroceded by the tribes, or reassumed by your service?

Dr. **Rhoades**. I'm pretty sure that there have not been more than one or two relatively small contracts for health care or pieces of health care that have actually been retroceded to the Indian Health Service.

The **Chairman**. I am certain that you have noted that we have just been called to return to the Senate for voting purposes. Since we were not able to study your written testimony, we just received it a few minutes before we opened the hearings, I will have to send you statements and questions for your response. So if you will respond to those questions I would appreciate that.

Dr. **Rhoades**. Yes, sir; we'd be very glad to. And I also extend my apologies to the committee for the lateness of receipt of that opening statement.

The **Chairman**. Senator Evans.

Senator **Evans**. Thank you, Mr. Chairman.

I wonder if you could explain a little more in terms—I wrote it down that this proposed bill would interfere with equitable allocation of resources. Is that another term for spreading poverty? [Laughter.]

Dr. **Rhoades**. That is a prospective relating to the allocation of medical resources which is not entirely inaccurate in a certain sense. I suppose it depends somewhat on the prospective of the viewer.

If I might give an example of the disturbance of achievement of equity, there are examples within your own representation, Senator Evans. If we were to carry out one of the provisions of this bill that says that a tribe that enters into a contract with us basically is ensured that level of funding, there are situations which undoubtedly would arise that would require an adjustment, even a lowering of that level of funding, or else we would have to take that funding from a sister program in order to achieve equity. There is just no other way to achieve equity without this differential distribution of resources.

Senator **Evans**. But what you're saying, it seems to me, is it's another way of saying we don't have enough money to provide all of the indirect costs for these programs, so therefore we just want to make sure that everybody gets shortchanged about the same amount?

Dr. **Rhoades**. No, sir.

Senator **Evans**. If everybody got an adequate amount then you wouldn't have to worry very much, would you about whether the early ones retained their adequate amount and subsequent ones would get their adequate amount?

Dr. **Rhoades**. The question of the determination of an adequate amount is one of those judgement decisions that leads to great discussion. The points of equity, or the failure to continue the equity process, is just as true with the addition of new resources as it is with the diminution of resources. One can achieve equity by bringing up those at the bottom of the scale, or one could achieve equity by decreasing those at the top of the scale or some combination therein. That process really is independent of whether there are enough resources or not.

Senator **Evans**. I guess I'd like to distinguish between equalization and equity. If you bring those from the top down, so everybody is shortchanged, that's equalization, but I don't believe that in my view it would be quite equity. I think equity connotes something a little more like bringing everybody to an adequate level.

Dr. **Rhoades**. I agree with that. That's the concept that Indian Health Service operates with.

Senator **Evans**. One of the problems that—let me go back to your testimony here. On page 10 you say, therefore the Indian Health Service is working with tribal officials to develop in IHS policy on tribal consultation and will consider the information and concepts included in a recent policy paper on this subject developed by the National Indian Health Board.

I think it might be helpful to have that policy paper submitted for the record, if it's not horrendously long.

Dr. **Rhoades**. We would be happy to do so. It should not be.

Senator **Evans**. Could you just describe for me then, very briefly, what you consider an appropriate policy for tribal consultation? What does that term mean to you?

Dr. **Rhoades**. The policy that is actually referred to in this paragraph, is intended to go beyond a policy regarding Indian participation. It is actually a policy to deal with all of the complexities of resources for programs, so-called administrative or indirect costs on one hand, and the achievement of equity on the other.

I do not know what adequate tribal consultation really consists of in its entirety and I would dare say that the definition of that would vary whether one is representing a Tribe on the one hand, or the Indian Health Service on the other. The way that Indian Health Service has addressed it, however, is that we have had a series of National workshops with Indian participation in the planning and design and the development of the agenda of that workshop, a given workshop. We've had a series of three now. During the course of operation of those workshops, we have been able to achieve a very high degree of collaboration in investigating, examining, discussing, and analyzing all of these questions between the tribes and the Indian Health Service. At the second one of these conferences, I believe, the breakthrough came when there was a proposal for dealing with so-called indirect costs that was developed by the tribes and discussed and placed before the assembly. The recommendation of which I accepted.

It is that kind of activity which we have attempted to replicate on a service unit by service unit and area by area level, that constitutes an interdigitation of Indian participation with the Indian Health Service. Obviously, without which progress cannot be made very adequately on such an important subject.

Senator **Evans**. At the beginning of your answer, I detected your thoughts that maybe consultation—what constituted adequate consultation may differ from the tribal viewpoint and from the Indian Health Service viewpoint in this case. But doesn't that in itself mean that you haven't arrived at true consultation?

It seems to me that consultation to be effective has to have both sides agreed equally on what constitutes appropriate consultation. If you have a difference of viewpoint, as to what that includes, then you're never going to get a meeting of the minds. We had this conversation in a somewhat different context with Mr. Swimmer a few days, and as I said to him, I thought then and I think now, that the best kind of consultation I know begins when the two parties sit down with a blank sheet of paper, and not when one or the other party comes forward with a fully blown program and puts it in front of the other one for reaction. That's not consultation in my viewpoint. I would hope that that's the direction and the movement that you're dealing with in your comments here in your paper.

Dr. **Rhoades**. That is indeed the direction that we are going in. I certainly don't want to imply that we have arrived at that point. I guess the only point that I would like to underscore is that the process of consultation is one of those processes that is considerably more complicated and difficult than that that you just outlined as well, notwithstanding the value of doing it that way.

The fact that we have not achieved that state of excellence in no way deters us from our determination to continue that process. In fact, we, I believe within a few days, will be assembling a group of Indian people to develop the next National workshop. It is my intention that they conduct the workshop. Therein also lies a very, very good example, I think, of the intricacy of it. I should not even be coming to that judgment. That is, I don't want to develop a wrong concept at the wrong time, but it is a little paternalistic for me to say, "You all do this."

There have been a number of instances, all too few, where Indian representatives and the Indian Health Service have set down with a blank sheet of paper. I've given serious consideration to the next National workshop perhaps being assembled with no agenda whatsoever. There are some dangers inherent in that.

Your point is well taken. We will continue this effort.

Senator **Evans**. Mr. Chairman, we're going to have to vote, I guess pretty quickly, but in leaving, and maybe it's something that we can save for a response when we get back, we've just received—I've not had a chance to look at it thoroughly, but an audit of methods of reimbursing Indian organizations for indirect costs incurred from the President's Council on Integrity and Efficiency. And I know that at least Mr. Swimmer has had an opportunity to respond to some of their recommendations, because those answers are included in the audit.

But I am concerned, first in your remarks on page 11. You say, it is possible that these costs would be more than the IHS would have available for the program's direct operation. And this on commenting on direct and indirect costs. And yet, there is an assertion that I hear through here and through the response of the BIA at least, to the Auditor General's report, that it is difficult to comprehend that the shortfalls attributed to the Bureau in this report are accurate since contractors have the opportunity to meet 100 percent of their indirect costs rates from the funding provided under the total contract amounts, any shortfalls for indirect costs would have to be self imposed. And yet the audit itself concludes that Federal agencies did not reimburse Indian organizations their projected total of about $14 million of the $88.4 million in indirect costs applicable to the fiscal year 1985 Federal Contracts.

Now, that's a pretty substantial opinion, and maybe we can get back to that when we return.

The CHAIRMAN. We'll stand in recess subject to the call of the Chair.

[Recess.]

Senator EVANS [presiding]. This hearing will please come back to order. The Chairman is currently involved in another meeting for a period of time and asked me to continue the hearing. I think we finally will have at least an hour before another vote comes by, so we'll have a little time to get through with this panel and the next one.

We left with a question hanging in mid air, and I just wonder if either or both of you would like to comment on either the initial comment on the audit, or particularly on this question of whether we just simply aren't providing enough funding for adequate indirect cost reimbursement, or whether we are and somehow it leaks away somewhere else, or whether we are and it gets funded and the tribes somehow are not using it for appropriate purposes?

Mr. SWIMMER. Mr. Chairman, if I may I'd like to address the comments you made earlier and the question you just asked.

I did receive a copy of what you read the title of, at 4:30 last night and I did manage to read through it, although I can't say I studied it in great detail. We received a draft of recommendations on this several months ago and we responded. Responses to that draft are in here. We have not been able to respond, obviously since last night, to this report.

In our response that you mentioned, what we're saying is that in 1985 the Congress instructed us to wrap the so-called indirect costs into the program. And we used that year as what we called the grandfather year. And we combined then the indirect costs, which was a separate line item in our budget, into each one of the program line items. We estimated that that particular year, as a sort of snapshot, we were at a 92-percent level of funding the indirect costs that the Inspector General had negotiated with the various tribes.

As a result of the Congressional mandate and the rolling those costs together, and then the subsequent flexibility that the tribes were given through the process of prioritizing their programs, we told the tribes that they would be able to take from those total dollars the amount of money necessary to operate their program. And even the amount of money that the Inspector General had determined would be their rate, if they chose to do so. And that's why we had contended that the indirect costs could be 100 percent funded if that's what the tribe chose to do and if they needed the dollars for that.

Now if we were dealing in today's environment or pre-1985 environment, technically you would have a shortfall of eight percent of the indirect costs at that particular time or this particular time. And the result would be that we could allow them to fund that out of direct program costs and would result in perhaps a decrease in program activity. But by putting those two sums of money together at that particular time in history we funded it as a single function. The tribes were permitted to take whatever they needed out of that, not exceeding what the Inspector General set as an indirect rate, to operate their overheads.

Now it's my understanding the IG mentions one program that was retroceded allegedly as a result of a lack of indirect cost. I don't know if that is the fact or not. I do know that we've had maybe one or two retrocessions in the history of Public Law 93-638. But it apparently certainly hasn't been enough of a burden to cause very many.

I might add that I do disagree with a number of the comments that are in this report by the Inspector General.

Senator EVANS. Well, it seems to me that in reading your comment of July 16, that while I guess a technical reading of it would be consistent with what you just said, it certainly gives the impression at least in my first reading of it that the Bureau did provide 100 percent of indirect costs and that if the tribes didn't see it somewhere, it was their own fault because they chose to use it for something else. But now I understand what you're saying is that there wasn't 100 percent of indirect costs in the first place. And that the only way the tribes could get 100 percent of their indirect costs would be to steal it from their programs. That's essentially what you're saying.

Mr. SWIMMER. If they used the entire rate that was negotiated from that year forward, that is correct.

Senator EVANS. So, you have not yet had a chance to analyze to determine whether or not you agree with the accuracy of their figure when they say, that we conclude the Federal agencies did not reimburse Indian organizations the projected total of about $14 million of the $88.4 million in indirect costs applicable to fiscal year 1985?

Mr. SWIMMER. I——

Senator EVANS. I'm not suggesting that that's necessarily all your fault either. It may well have been legislative shortfall as well as administrative shortfall. But do you believe that's an accurate figure?

Mr. SWIMMER. Well that's an accurate figure if we go strictly by the rate that has been authorized by the Inspector General. One thing that I think they're confused about, is that they are comparing an indirect cost rate generally negotiated by Federal contractors, by people who do business with the Defense Department, HUD and other agencies with the concept that was built into 93-638 which is called contract support funds. But these aren't intended to be contracts. These are intended to be a transfer of a Federal function to an existing government that we anticipate is in business to govern at some level. And that there will be enough additional money transferred to that Government to cover those costs like insurance, the outside accounting that would be required and anything that is extra to the actual operation of the program by the government. The appropriate contract support fund was never determined. And instead at the very outset the concept of indirect costs, instead, was substituted for the statutory language of contract support. It was the ease of operation of the Inspector General instead of going to a tribe that deals with HUD and other agencies and negotiate an indirect cost and then determining what the proper contract support would be for IHS and BIA transfer functions of Federal responsibility, that they simply used the indirect costs.

We've contended that it's mixing apples and oranges to some extent here, in that the true cost of operating that program, or the extra costs over and above even to the point of including elected governmental costs in the negotiation, is not as accurate as it should be, and in some cases it's just misleading. I think that it's evident in my testimony of a few days ago where I gave you, just in one area of operation such as education, we can do the same thing in the area of law enforcement or other contracts where the contract support can vary for the identical function. We used the example of the accountant and depending how the Inspector General figured it, it could vary from 5 percent to 50 percent. And we're not trying to negotiate. This isn't an adversary proceeding. We're trying to make sure that the tribes have sufficient moneys to cover their overhead costs of operating this Federal function.

And I have no feeling at all about denying the tribe. I've been there. And I want to see that they're adequately compensated. But I don't believe that it's necessarily the same item that the Inspector General negotiates for other Federal agencies, universities, schools and contractors, when we're talking about these kinds of activities that we are transferring to the tribe.

Senator **Evans**. It seems to me, however, it's really distinction without a difference. That when you talk about contract support or indirect costs, it seems to me that the fundamental description of what you're trying to do is say here are the direct costs of running a program or a contract, whether it's a university contracting to the Government, or an Indian tribe contracting to the Government.

You've got a certain function, certain direct costs. In addition to that the organization has other costs which clearly they have to assume in carrying out that particular function. And that's whether you call it program support costs, or indirect costs, they're all the same thing. It's the extra costs which are legitimately assigned against that contract, which would not have been there if you didn't have the contract. What's the difference?

Mr. **Swimmer**. Let me recognize Ms. Hazel Elbert who is at the table with me and consulting.

Senator **Evans**. Surely.

Mr. **Swimmer**. Essentially we're talking about the same thing, I think, in that context. That you're right in that's the way it works out. My perception however, is that indirect costs for a contractor that is applying to the Government, say on an RFP, would be a negotiated process that would not necessarily be equivalent to a situation where there are program dollars already identified that are performing this particular function and we're simply transferring those program dollars to another government to run the same program. I'm not sure that the indirect costs that the Inspector General has—the negotiating atmosphere that he is engaging in with that tribal contract or that tribal government as a contractor should be at the same level.

But we are essentially talking about exactly what you just said. It is, whether it's transferring a function or a contract from the Government, the indirect cost or the contract support is to cover that extra over and above expense short of profit that the contractor or tribe would incur.

Senator Evans. Dr. Rhoades, what's the experience with the Indian Health Service on this whole question? Do you feel that there is an adequate amount available or set aside so that it really does cover those indirect costs or are we just spreading a shortage around?

Dr. Rhoades. I believe, in fact, it is a great deal of the latter. The situation as it applies to Indian Health Service is somewhat different than in the Department of the Interior. One of the things that we have attempted to do in conjunction with the tribes, is to establish just exactly what those indirect costs are.

There is some reason to believe that the establishment of indirect costs may not really have a very close relationship to the actual costs of operating a program. Again, there is a great danger of antagonizing somewhere, and having come from an academic background, my impression is that the concept of indirect costs largely have been subsidized costs for, let's say medical education, in one sense. The difficulty that is posed to the Indian Health Service is that a tribe that is able to negotiate a 30-percent indirect cost rate, for example, of a fairly sizeable program based upon what information we have, provides them with funds that are available to them to carry out tribal activities unrelated to the health program.

And that is fine. I applaud that. I would be trying to do that as a Tribal Chairman. But the question that it poses to me then, as being responsible for providing those dollars for health care is if I have tribe B sitting over here that is trying to get some indirect cost dollars, should I be providing indirect cost dollars to tribe A over and above health programs? I think not. And it is because the Indian Health Service had no good mechanism for establishing what those costs were that lead us to want to, as you've already alluded to here, abandon the concept of indirect costs. That's a concept that's weighted down with all kinds of other baggage.

We believe that it should be possible to identify what those costs are. Of course we want to make those costs available to the tribe, but the funds that we have available to us are those funds that we would have previously used to operate that program. That's all the funds that we have for that activity. Within the general funds there now are two categories of utilization. One is for administration in the tribe, and the other is for the services. A negotiation that takes up a good deal of our time is negotiating how much that is. That is a tribal choice. A tribe may elect to do more or less with the administrative dollars within that package. Further compounded, I don't want to beat this tired horse, is that the funds that I have available to distribute under the equity doctrine to a tribe in fact depend upon the relative position of their collegial tribes. To perhaps oversimplify something that I'm not sure is widely understood, the mere fact of having an established indirect cost rate or a cost pool has really nothing to do with the availability of dollars for that.

And therein does lie, in my opinion, the great difficulty.

Senator Evans. OK.

If that's the case, then take a snapshot at any one time, and from that point another say fairly large unit, medical care unit, is assumed by the tribe instead of being run directly by the Indian Health Service. They then have two responsibilities as you pointed out. One of the indirect costs, the administrative costs of running that program, and the other the cost of the program itself. You shift the money to them, will you shift the program money?

Dr. **Rhoades**. Yes; let's call it program money for all activities related to that activity, let's say in a hospital for purposes of clarity. We give them all the money that we have been spending for that activity.

Senator **Evans**. But do you include in that, and do you assign an indirect cost to yourself. You know, beyond just running that facility you also have an indirect cost. It's all the administration and the rest of the people that are involved in headquarters of the Indian Health Service. It seems to me that an adequate or an appropriate way to do that would be to sort of figure for yourself what the indirect costs are of running that hospital, and when you transfer the money, transfer the program money plus the indirect costs, because you no longer have those indirect costs presumably.

Dr. **Rhoades**. We have the indirect costs, but it is handled in an entirely different way. I guess as good an illustration of the fundamental difference between a government doing business, and in this instance a Tribe sort of behaving as a private entity.

It sounds like you may have heard from me that we give them program dollars for medical services and then put indirect costs on top of that. No, I want to make clear that my use of the term program here is all of those costs that are associated with running that hospital. We give that to the tribe from within which must come the dollars that are used for what we are sort of calling indirect costs. We have had tribes, for example, the Oklahoma Choctaw that took over the hospital at Talihina. They basically paid for the indirect costs for operating that hospital themselves. They contributed their dollars to that because the amount of money that was available in total for that program, they felt, was not sufficient to keep the program at the level that it had been operated, and also provide those additional tribal administrative costs.

Other tribes have done it different ways. We do take into account our best assessment of what the indirect cost is for the Indian Health Service. That has proved to be an extremely difficult, and so far unsuccessful activity, because the entire bookkeeping system of the Federal government is not designed for that. We've got to try to, within that context identify those costs. We have made agreements with the tribes. The two pilot projects that I alluded to in my opening statement, and did not discuss, were designed specifically to help us sort out those, what I would prefer to call, direct costs of doing business.

I might prophesy, sort of on behalf of Mr. Swimmer. I have a strong suspicion that when the dust comes to settle and there is some general agreement, if there is, on what the size of those costs may be, it's going to be very close to 15 percent in my opinion. I don't know that yet.

Senator **Evans**. I might say at that point, that suggests that if it indeed is 15 percent than we're spending way, way too much now, because we're spending a lot more than 15 percent now.

Mr. **Swimmer**. No.

Senator Evans. At least in the audit here of the President's Council on Integrity and Efficiency, it shows them considerably higher than that.

Mr. Swimmer. Our records have indicated that there could be fewer dollars than are presently spent. That was not the intention of 15 percent. When I originally had our budget people look at that, it was almost identical to the amount of dollars presently committed, presently committed, not dollars that had been negotiated. It was almost equivalent to our budget and that's one of the reasons why I looked at the 15 percent as being a number, because that's what we were giving out then.

Since that time, I think, in doing some more figuring there does appear to be maybe—that might result in fewer real dollars out of our budget, and that's why the 15 percent may need to be adjusted to 18 percent or something. I don't agree that that's necessarily the right number. I just think that so far it's been our best effort at determining what the costs are. But again, this was in no way intended to be a reduction of the budget in that area. But I think it does, if you look at the Inspector General's report as I read it, the 38 tribes he studied had rates between five and twenty percent. And as I mentioned in my earlier testimony the two largest tribes in this country have rates of 15 or under percent. We seem to be in the ball park there in that abberations of 40, 50, 60 percent are due to special negotiations that have gone on, or maybe lack of negotiations that have gone on, but it's that process that got maybe out of control, or it was a particular situation that generated it.

Now I might say, too, that we, our two agencies even are different in the way we approach this. As Dr. Rhoades said, he is much more in the nature of what I described as our grandfathering, and that, I think, was based on their budgeting, and that's what Congress had asked us to do in 1985. We actually provide 100 percent of the program costs, but we then have another line item of $40 million that is tapped for the so-called indirect costs. So we give 100 plus percent. Back in 1985 what we had proposed was putting that $40 million and spreading it through the existing programs and having that as a one-time transfer and using it like IHS, therefore the tribe could in fact technically fund their indirect or they could use it for program expense.

The point I'm trying to make is that one way or the other, if we can work into here, not penalties but incentives for tribes to save, and to use more for program dollars, we're going to get more program out there. On the other hand there does have to be sufficient balancing, that we don't deny the tribe the right amount of the necessary amount to operate their government, but short of making a profit or doing things that they may want to do, but really are not direct program relations or directly related program operations.

Senator Evans. I would ask you, for the record then, to comment particularly on page 13 of the President's Council report, because they go into some detail on various levels of flat rate and they suggest, at least in their report, that it would take a flat rate of somewhere close to 30 percent to equal the authorized amounts based on approved rates. So, for the record let's get to that. I don't want to spend too much time on this one element. It would be helpful if you could do that.

Mr. **Swimmer**. I certainly will. I certainly challenge that. It's just not an appropriate number, but I think we can give the committee some enlightenment on where that came from.

Senator **Evans**. OK.

There'll be other opportunities, of course. It's obvious that we'll have to go into some detail on the analysis of that report, and I'm sure there'll be plenty of opportunity to get at it.

But, Dr. Rhoades, to go back to this whole question of how much is appropriate, let's take a theoretical organization, an organization that has 10 hospitals or clinics. And that organization has in addition to all of the direct costs that are involved in running that hospital or clinic, a supervisory organization. And the supervisory organization includes whatever is necessary to—you know, and those are the indirect costs.

And I guess what I'm getting at, if we start shifting responsibility for those organizations to others, and over a five-year period all 10 of those were shifted, wouldn't it be logical at that point to eliminate the supervisory organization, or come pretty close to it?

Dr. **Rhoades**. Again, that is a concept that has been within Public Law 93-638 since the very beginning. I remember the original hearings on the bill before. There were a number of witnesses, not including myself, that believe that as using your analogy, there should be a proportionate decrease in the, let's say the size of the Indian Health Service in this instance.

I believe that to be true. However, no one knows what those units are. There doesn't seem to be a good way to arrive at them. They're clearly not one to one, unless someone, the Congress in this instance, wishes to remove responsibility for various activities, from the Indian Health Service, I do not believe it can be one to one.

Senator **Evans**. Could you describe some of those activities?

Dr. **Rhoades**. For good or bad, in fact, there is an Indian Health Service in this Country. We have, I believe, as nearly an ultimate comprehensive medical program as exists in the world. A large part of the success of that program has come from consultative activities. The maintenance of what I addressed earlier as quality assurance. What are all of those elements that make that up?

One of the dangers, I believe as a physician, that lies in Public Law 93-638 is what I call the vulcanization of that program. Are we going to have a system of medical care in this Country for Indians, or are we going to have 400 different ones of all varying degrees, some of them operated by tribes with 250 members, or are we going to continue to raise the status of health of Indian people to the highest possible level? It is my contention that the mere process of turning the activities over to the tribes requires somebody to be responsible for that. There still is a responsibility to the Federal Government.

It is, I believe, too easy to say that if there are 10 tribes, there should be a 10-percent reduction in the government's administrative staff for every one of those that disappears. I think that that would create in some instances, chaos. There will be two crossing lines of personnel, and one of the things that I think that makes it difficult right now, is that in fact we are in a transition period. I have found in most of the areas that have had to change over from an extensive direct delivery to tribal delivery the requirement for additional personnel. Somebody's got to deal with the technical assistance. Someone has got to deal with the fiduciary responsibilities, and so on and so forth, which was not previously present in that way in the Indian Health Service.

I don't know what the size of those are. We are trying to define the size of both sides of it. There are no previous precedents, that I know of, that give us good guidance. I think therein lies one of the reasons why the traditional indirect cost setting mechanism doesn't fit with this otherwise unique program. I realize that that has a distinct disadvantage of appearing to sound like a preservation of the Indian Health Service bureaucracy, and I certainly do not propose that whatsoever. Somewhere between the walking away from the responsibility of health for Indian people and maximizing the taking over of the programs by the tribes, is a balance in there of Indian Health Service activities whether it is someone who coordinates maternal and child health activities across this Country, or whether it is someone that coordinates the immunization level of Indian people across the Country, or whether it is a physical therapist that assures that the standards are maximum. Most of those cannot be contained in small individual units of health care.

I'm talking about a whole different order of approach to the health care of Indian people that I believe would be very, very unfortunate if it were dropped out for the obvious good of self-determination.

Senator EVANS. I understand all of that and I think that there's probably some—certainly some truth in small and isolated areas. But I think the fundamental concept that somehow there needs to be an overarching Federal presence, or otherwise you get vulcanization, flies right in the face of our total medical system. We don't have an overarching Federal presence in our regular health care system.

Dr. RHOADES. Therein, I believe, lies a very fundamental weakness of the American system of medical care. It is a reflection of the superior ability of the Indian Health Service to make the greatest strides in improving the health of a group of people in this Country that has ever been made. I think that you have identified probably the one essential aspect of that that reflects the difference between the Indian Health Service and the usual American health care delivery.

Senator EVANS. So I presume then, you are for a National health service?

Dr. RHOADES. I don't think that conclusion necessarily follows.

Senator EVANS. It sounds an awful lot like it to me.

Dr. RHOADES. Yes, sir; I don't want to put down American medical care either. I happen to be a graduate of that and a participant of that. It happens to be the finest in the world also in its right.

Senator EVANS. Well, that's another subject at another time. [Laughter.]

Well, we do thank you for the testimony and these questions. We have perhaps focused more on some of the indirect cost elements than we should have compared with some of the other problems, but we'll be back and we'll need the help and I'm sure we'll get it of both of you and your agencies as we try to develop the very best in the way of self-determination to give the maximum amount of opportunity for Indian tribes and tribal organizations to engage in self-determination in a responsible way.

Mr. **Swimmer**. Mr. Chairman.

Senator **Evans**. Yes.

Mr. **Swimmer**. If I could make one correction. I did make a misstatement and I said two or three programs had been retroceded. I'm told we had about 10 over the last 10 years. And I didn't want somebody to take that as a misstatement. They're various programs, but about 10 had been retroceded.

Senator **Evans**. And do you know what the rationale was for—was there a single set of rationale for retrocession, or did they vary from place to place?

Mr. **Swimmer**. Most of them appear to be in the law and order area, and result from lack of program funding. Not necessarily an indirect cost issue, but the money in some areas is so small and often this could happen, I imagine it has in a multi-tribal agency, where a tribe might get enough money for one law enforcement officer and a part-time secretary or something, and they've just decided to retrocede it to us.

Senator **Evans**. Have there been any retrocessions of consequence in the Indian Health Service programs?

Dr. **Rhoades**. I don't believe of consequence, Mr. Chairman. I understand a couple of fairly small contracts in Alaska were simply not renewed and I truthfully don't know the motivation behind those.

Senator **Evans**. Thank you.

Dr. **Rhoades**. Thank you. We certainly look forward to an opportunity of working with the committee. We expect that we can do things better and we will try.

Senator **Evans**. Thank you very much.

The next panel is the Honorable Ron Allen, Chairman of the Jamestown Klallam Tribe; Mr. Reid Chambers, Attorney, expertise in Federal tort claims; and Mr. Eric Eberhard, Attorney, on nonprocurement and mature contract.

We welcome you gentlemen to the witness table. We'll start out in order with Mr. Ron Allen.

Mr. Allen.

STATEMENT OF HON. WILLIAM RON ALLEN, CHAIRMAN, JAMESTOWN KLALLAM TRIBE, SEQUIM, WA

Mr. **Allen**. Thank you, Mr. Chairman.

I appreciate the opportunity to come and testify before you and address some of the issues that you've been entertaining this morning, regarding your amendment bill.

I'd like to make an initial request, if it's reasonable. As you know, in the Northwest and in coordination with Affiliated Tribes of Northwest Indians we have conducted a study addressing the indirect costs issue. And we've come up with this report that we feel is reasonably comprehensive in addressing indirect costs. And so if it is reasonable, we would like to have this report entered into the record regarding this issue.

Senator EVANS. Certainly we will enter it in or attach it to the record. I don't know with the volume of the report how precisely we would do that, but we will indeed make it an effective part of the record.

Mr. ALLEN. OK.

We sincerely appreciate it. Because we have been working quite diligently at trying to get a good handle on this issue since it's a major goal of the Bureau and an objective within this amendment bill. And we feel that it is very important in terms of addressing indirect costs.

I'd like to just address a number of issues as I heard both the Bureau and IHS address the proposed amendment. One of the things that I am a little bit concerned about is Mr. Swimmer had made a suggestion of proposing to this committee to submit a modified version or even a new draft version of this bill. I'm not sure if I heard it right or not, but I would express my concern over any kind of a total new version of this bill at all from the Bureau or from the Administration, because in my judgment this bill has been a collective development of the tribes.

I feel if there is a version out here regarding this amendment that belongs to the tribes, that is basically coming from the tribes' hearts and those of us who are out there making this thing a reality, this bill is it. We do believe that there are a number of issues within this bill that needs to be addressed and that we'd like to address, but we think that if the Bureau or IHS is going to make some suggestions in terms of improving the bill and its objectives, that this is the draft that should be utilized. I guess I just wanted to make sure that you understand that I'm particularly concerned about their approach, and the committee's consideration of what may happen there.

Senator EVANS. After my comments on consultation starting with a blank sheet of paper, now that the paper is no longer blank, but that we have developed something, I think that this will be retained certainly as the base from which we work. Obviously if we can find ways to make it a better bill, we all want to do that.

Mr. ALLEN. OK.

I appreciate that.

I want to make some general comments about some of Mr. Swimmer's comments regarding indirect costs. Dealing with indirect costs and dealing with the preservations of the tribes' funding base is a very important issue that we have been addressing. Mr. Swimmer has made reference that they are still strongly considering some sort of a flat rate fee and/or some sort of an approach that is a simplified approach, and in terms of dealing with indirect costs.

Our position is, is that it's not that simple. That's part of what our study has addressed, that any kind of approach of a flat rate is just not workable within this system of addressing the true costs and the recovery of those costs by the tribes in administering BIA/IHS contracts and grants. That the level and percentage of indirect cost is unique to each tribe. Each tribe, relative to its situation wherever it is geographically, and whatever its conditions are, whether it has resources, or doesn't have resources, or whether it's a tribal organization that absolutely has no resources, but just operates programs in behalf of its member tribes has to be addressed according to those conditions. The recovery of the indirect cost rate has to be negotiated between the tribes and the Inspector General office in terms of determining what those costs really are. They should be able to recover those costs in full.

I concur with your comment that what's really happening since 1985, or actually previous to that, is that it has been a deterioration of our programs in order to cover the true costs, or else it has been a reduction in the tribal assets in order to carry out these Federal program functions. So in our judgment the existing system is a good system, and the proposed bill is addressing that system and hopefully improving it to clarity that the present process is the correct procedure for the tribes to identify those costs and to recover those costs. And justifying that we have a right to recover those costs.

One of the things that we pointed out in our report, is there are a number of costs that even in the indirect cost is not actually recovering all of the costs that the Federal Government spends. In making a proposal of regrandfathering, as Mr. Swimmer had pointed out, where the tribe gets the full amount of funds for their direct and for their indirect at a snapshot year, there are costs outside of the tribes' control that will change those things. Insurance is one of the better examples. It can slowly consume a larger portion of those indirect costs. So it will eventually deteriorate the direct program services of the tribes.

Our concern is that whatever language we incorporate into the bill, that there is an opportunity for tribes to make adjustments to their indirect cost rates. Because no matter what snapshot year you take, whether it's fiscal year 1985, or whether it's fiscal year 1988, there are a number of tribes that don't understand what indirect costs are, that aren't negotiating their true costs, and there are a number that have been set up in a situation with their contracts, so that their rate is not their true rate. Therefore the problem is funds that they would be recovering is not the true numbers. So when we this implement this bill, most of the tribes should have the opportunity to make sure that their true rate is what is incorporated into this process.

Our approach is that the simplification proposal that Mr. Swimmer has made would not work because, if some tribe happens to fall within that percentage, if it's a 30-percent or whatever it might be, that's fine. But every tribe that is around that, if it's 35, or 45, or 65, or 105, and there are tribes that are 105, they are very small tribes with very small bases. And it's a very legitimate cost recovery for them. That the flat rate won't work for them and there's going to be a considerable amount of injustices in the funding level.

One of Mr. Swimmer's proposals has been to try to provide subsidizing grants. Even at that there's a problem in terms of identifying those true costs and a consistency of the funding to provide the return of those costs. I do want to hopefully address that particular issue. I'm hopeful that we can have an opportunity to work with you, your staff and the Bureau as they make their proposals, that we can have the opportunity to look at it closely so that we are assured that whatever law is adopted in addressing this, that it is the law that's going to be able to address all of our needs. From the small tribes to the large tribes and to the tribal organizations that don't have any resources at all. We're all very concerned about that.

I do have another concern over one of the clauses that's in this bill that's dealing with the IPS system. One of our objectives that we're trying to accomplish is to try to protect the tribe's base budget, so that we have consistency and predictability of our funding for future years and that we can move our funds around.

You've incorporated into your bill language that would allow the tribe to move money from one program to another, but we do have a concern about the Bureau's proposal to remove some activities out of the IPS system, or into it, we feel that it is very important for the tribes to have adequate time to respond to such a proposal. The way it's addressed now in the bill is that the Bureau would be able to notify the Congress and the tribes through the Federal Register, 90 days prior to the implementation of their proposal. In our judgment and in our experience, that is not enough time.

What we are suggesting is that that time frame needs to be extended to at least 1 year, which allows tribes adequate time across the Nation to address and modify, if necessary, any proposal that would be affecting tribes' contracts and programs. What we refer to as the tribes' funding base. We feel that we need that kind of time frame in order to unite all the different tribes in terms of addressing the issue. Because often the Bureau may come up with an idea, wherever the idea comes from, and it may not be in our interest, therefore we need adequate time in order to address obligations with clear reasons. We would like you, Mr. Chairman to consider that notification go specifically to Congress, so that Congress knows the Bureau is proposing it.

The bottom line of this concern for us is that where—I've repeated this before, where only one-third of the BIA funds go to the tribes directly, and we're trying to protect that base so that we have some sort of protection of the funds and programs we are administering. If we're depending on some funds, and in a very short notice those funds are reduced from us, it can have a significant impact to us. If it's a larger tribe, they may be able to deal with it a little bit easier. But if it's a smaller tribe, it would be much more difficult. So we're trying to oppose that that process be firmer in terms of protecting our base funding, so that the tribes can have assurance that our base programs do have the highest priority in the BIA budget.

Another thing is, is that in addressing contract development and also developing of indirect cost rates, this bill has a clause in it to try to improve the technical assistance. We would like to suggest that the technical assistance be structured or else referenced in maybe the report language, whatever it might be, so that the tribes don't necessarily have to get the technical assistance directly from the Bureau. We have numerous examples where the tribes have received direct assistance from the Bureau in developing their indirect cost rate, for example, and unfortunately they ended up with an incorrect rate. Just last week when I was at NCAI and I discussed these issues with a number of tribes from Oklahoma, they were telling me where they got their assistance, and then they told me what their rate was, and we had told them that something is really wrong here, that your rate is totally inaccurate. They said they got their technical assistance from the BIA.

What we're suggesting is that maybe that if we can put the language in here that those tribes can reach out to other entities or parties that can come in and assist them in developing those rates so that they're recovering their true rates, and assist them in educating not only their staff, but their councils, so that they're developing their true rates, and so that they'll recover their full costs. We think that that's very important.

If it's worded such that the Bureau is going to provide it, I have a serious concern if the Bureau's motives aren't the same as ours, the tribes'. Our position is that sometimes we are given the argument that what we're trying to do is unjustly recover money through the indirect cost rates from the Federal Government, when it's not true at all. What we're doing is identifying those true costs and many of us across the United States have actually been able to identify them explicitly in recovering them, so we end up with the rate and we end up with the numbers that we should be really receiving. Then unfortunately, Mr. Swimmer and others have noted that there are tribes who don't even have 15 percent, who have 6 percent and 2 percent. Those are the tribes we've identified that have been receiving bad technical advice, whether the Bureau is not knowledgeable enough about it in those respective areas, or whatever it may be, but they do need to have that opportunity so that everybody can recover the costs they should be recovering in implementing these contracts and grants. In our judgment that will make the program and the Self-determination Act successful, unfortunately what were trying to do now is do a job with inadequate resources.

One of the objectives we'd also like to request from this committee, hopefully, is we feel that this bill is streamlining the bureaucracy a lot. We think that by eliminating a lot of needless oversight by the bureaucracy that we will be saving the Bureau, we think, hundreds of thousands of dollars, and potentially millions of dollars. What we feel is, by doing that, that we need assistance because we feel that those savings should be redistributed to the tribes. Our problem today is that we don't have enough money to qualitatively carry-out all the programs that we're asked to do.

We're microcosm governments and we're asked to do everything that any other government would do with very limited resources. It doesn't make any difference whether it's a small tribe or a large tribe, if we're creating a savings what we would like to see is that these savings get redistributed back to the tribes and not necessarily to some new initiative by the bureaucracy. As any bureaucracy, they can always think of new reasons that they need money for ADP equipment, or for new personnel, or for new whatever is desired, whatever is on their wish list. We have the same needs. We feel that the purpose of the act and the purpose of the funding is for the tribes. If we're creating a savings and we're going through all this effort to cause the savings, we think that those savings should come back to the tribe to help us fund different needs that we have, whether it's in social services, or like Mr. Swimmer had mentioned, in law enforcement or whatever.

We have law enforcement needs, but the BIA hasn't been able to adequately fund this program. So we should be able to start funding there programs and if we create savings then the extra fudns should be going to our programs where those savings can accomplish our objectives, and accomplish, in our judgment, the true intent of self-determination.

We know that the savings are coming around the corner, and we're very confident about it.

I don't know, I question whether or not—Mr. Rhoades alluded that the more and more we contract out, the more need for additional personnel for oversight. We don't believe that's true at all. We believe that the tribes are becoming more and more competent to handle each of these programs or services and that the tribes are becoming the expertise. It's not necessary for the Bureau to have a counterpart expertise no matter if it's in fisheries, or if it's in social services, we agree, they need to have "some" people to have minimum oversight, but they don't need to have the same comparable type and number of a staff that exists today. So we would disagree with that position, and we feel there should be an incentive for the Bureau, both bureaus, to become more efficient with their funds.

I'm also a little bit concerned about Mr. Rhoades' comment that if we create a protection of the tribes' base funding, that that would necessarily create a reduction in the Bureau's programs that serve the tribes directly. That is not what we're trying to accomplish. In our judgment that shouldn't be the case at all. We feel that inside of the bureaucracy that there is other administrative functions that also have a considerable amount of funding and that our objective here is that if there's a way to create savings, if there's a need for reductions, whatever they may be, and if they're across the board reductions, the tribes haven't objected to absorbing their fair share, like the Gramm-Rudman for example. But if it's a program within the Bureau, our position is that the Bureau should sincerely look for ways to absorb the reduced funds out of their administrative costs, out of their administration itself and not out of the tribes'. So that we can actually carry out our responsibility(s).

So I don't think we would agree that it's a matter of making it appear like if we're trying to protect ourselves, and in doing that we're also hurting other tribes who are receiving direct services from IHS or from the BIA. That's not the case at all. That's not what we're trying to accomplish.

There is another point, let me get back to indirect costs again, if you don't mind. Mr. Swimmer made a comment that the idea of simplifying the indirect costs is to try to help eliminate very costly negotiations. There is, true enough, a cost to putting together your indirect cost rate. But we are getting better at it, so the actual cost of that process is not something that we feel is overly significant in terms of putting that together. We feel that as we are getting better at it and more knowledgeable about it, that the actual cost continues to be reduced. I've experienced that with my tribe, because I develop our tribe's indirect costs rate and I do the negotiating with OIG. Each year I have found it faster, easier, and less costly. The main reason is because I've become more knowledgeable about it. So I feel that that argument is not a good argument, particularly in light of the need for the tribes to make sure that they're recovering all the costs that they are entitled to administering those programs.

Mr. Chairman, I think, let me leave it at that for now for my comments. If you have questions I can try to answer them.

Senator **Evans**. Thank you very much, Mr. Allen.

We turn to Mr. Reid Chambers.

STATEMENT OF REID CHAMBERS, ATTORNEY, SONOSKY, CHAMBERS & SACHSE, WASHINGTON, DC

Mr. **Chambers**. Thank you, Mr. Vice Chairman.

I will comment briefly on the Federal Tort Claims Act issue, which the committee heard testimony on in Tampa last week. I also just wish to restate the problem given the Government's opposition to this.

The Government doesn't disagree about the problem that exists. Dr. Rhoades testified this morning, and it's unquestionably true, that the Government when it operates a health program does not carry malpractice insurance. The Government, the BIA, doesn't carry liability insurance. If a problem comes up, if a tort comes up, then the Government defends under the Federal Tort Claims Act, and it pays any judgment that's entered against the Government, because the Government is essentially a self-insurer.

Now when a tribal contractor takes the program over, they get just the funds that the Government uses for the program. The tribal contractor is not a self-insurer, the Federal Tort Claims Act defenses are not available to the tribal contractor, so the tribal contractor has to go and purchase insurance and self evidently this decreases the amount of money that's available to provide services to the Indian people, because the contractor just gets the money that the BIA or the IHS had when it was operating the program.

Now the decrease is large. Dr. Rhoades indicated this morning that he would get the committee the figures for the Indian Health Service on what they understand tribal contractors pay for insurance. We had understood that the IHS had done a study, and we had understood that the magnitude was about $4 million estimated for insurance costs in the next fiscal year. But we'll have apparently more precise figures than that.

We do know, as my client the Alaska Native Health Board testified in Tampa, what the figure is for Alaska. For the last 2 years combined in Alaska, it's almost $2.5 million in insurance costs by native health contractors in Alaska. For the next fiscal year it is certain to be at least $1,700,000. The health insurance costs of course keep going up. Since 1984 fiscal year, they've gone up by over 400 percent in Alaska.

Now this is part of a national problem, but it's a very serious problem for the health contractors in Alaska and the health contractors nationally. It's not just a question, Senator Evans, of the cost of the insurance. It's also a problem that some contractors can't buy insurance at any price. My client, the Yukon Kuskokwim Health Corporation, is facing that danger now. Some of the functions that the Alaska health contractors provide, such as community health aides, cannot be covered by insurance. The first line of defense in Alaska is the community health aides in the villages operating on radio contact with doctors at some base clinic. They're finding that they can't get insurance to cover the work of the community health aides.

So there's clearly a serious problem. It's of a large magnitude and it's a major decrease in the services that can be made available with the constant Federal dollars to the Indian people, or native people.

Now the Government, Dr. Rhoades' testimony this morning, said, well please don't enact section 201 of the bill. The first argument the Government makes is, I guess I can call it a Pandora's box argument. In other words, you'll open the lid and in will come not just Indians, but every other conceivable kind of claimant, contractors under the Veterans Administration, or buy Indian contracts, and this or that or the other thing. And therefore, once the door is open everything will come in, and the Government will be swamped.

Now it's very important—a Pandora's box, I guess, Senator Evans, is a common lawyer's argument——

Senator **Evans**. It's a common legislator's argument. [Laughter.]

Mr. **Chambers**. I think it's very important to be clear on why it's not right here. And I think it's very clear why it's not right. This area is a unique responsibility. This is not a precedent for the Veterans Administration. It's not a precedent for contract care where the Government provides contract care elsewhere. Where the Government is providing contract care with private physicians, those physicians already carry malpractice insurance. Not so with the Yukon Kuskokwim Health Corporation. Not so with the other health corporations in Alaska. And the Government's responsibility in this area is unique because of the Indian Self-Determination Act, which was an important policy judgment by Congress.

These contractors, but only these tribal contractors, stand in the shoes of the Government. They're providing a government responsibility, which is an important trust responsibility of the Country, which is an important component of National policy for over two centuries. And so when anybody else says this opens Pandora's box for all these other people, there's a clear answer to that. This is not a precedent for anything else. This is a unique trust responsibility and it only applies to tribal contractors. So I strongly submit that the committee should reject that kind of an argument.

Now the Government also comes in—they didn't do this today, but the Justice Department in a letter to the House Committee, about 10 days ago, raises the following problem: they say that we can't control these tribal contractors and therefore it's unfair for the Government to be responsible under the Federal Tort Claims Act for their actions. Well, that's not so either. The Government can decline to contract if the contractor is not competent. In fact, Dr. Rhoades testified this morning, and acknowledged that in general the tribal contractors are at least as competent, I think he said—you know, the record will show what he said—but I think he said that they're more competent in the general case than the IHS.

Certainly that's borne out by the history of claims, Senator Evans. In Alaska there have been three claims filed in all the years that the tribal contractors have been operating health programs. Two have been dismissed without any merit at all, and the third is still pending. So there is not some major liability being conferred against the Government if you adopt this bill.

The last argument that the Government offers—I guess it's not really an argument, I guess it was an alternative that Dr. Rhoades offered—is that the Government will come up with the money and pay the insurance costs. Well, on paper I guess that sounds okay. But I'm very skeptical about it and I would expect the committee would be skeptical about it. I just have a—it's more than a sneaking suspicion, it's a strong feeling that what will happen is that this money will come out of health services for Indian people. I mean there's obviously only so much money that's available for Indian programs. Obviously that money has gone down dramatically, in terms of constant dollars, say from what it was, 8 or 9 years ago before the first budget cuts in this administration. We all know there are reasons for those cuts, and I'm not debating their merits, or even their distribution, right now. But I'm just pointing out that I think what's going to happen is that this isn't going to be extra money. It's going to come out of some other Indian program and it's going to hurt the Indian people of the country.

So I think virtually all tribal contractors in the Country would strongly urge you, as they did last week in Tampa, when the committee heard testimony on this down at the National Congress of American Indians, that Chairman Ron Allen referred to, that you not give in on this, and that you stand firm on this.

The other thing I'd like to address just briefly, Mr. Chairman, is what I would call obstacles to contracting. I think all of this has been presented in testimony before the committee. For some reason, often when a tribe or a tribal contractor, or a regional health board in the case of the Alaska Native Health Board, wants to take on a function, they're met with some kind of defense on it, and declination on it.

Now the argument is often that this is a trust function. Well, of course anything is a trust function. The whole trust responsibility comprehends this field.

Or they're met with an argument that this is a function performed by the area office, rather than just one tribe, or this is a function provided statewide or something else. Well, there are usually statewide organizations that can take that contract. We have numerous instances of this. The Yukon Kuskokwim Health Corporation, for example, wanted to contract to provide the functions that sanitarians provide. And they were met with a declination because that function is provided by the whole Alaska area office. The employees who do that are in the area office, so IHS said we can't contract that for you. Now in fact, the health corporation ended up providing that function anyway out of program funds, and the sanitarians in the area office had very little to do.

Similarly with third party payments. My client, the Yukon Kuskokwim Health Corporation offered to take on that function. They're doing it in some areas, and they are doing it efficiently. And, with all respect, the Indian Health Service is not doing it efficiently in Alaska. IHS declined to contract with my client on the ground it was an area function. And there are other instances in personnel management, or construction of waste disposal systems, where contracts get declined because they're an area function.

Well, why is this? I think it's happening—I mean Dr. Rhoades said he wasn't trying to defend a bureaucracy, but I think Chairman Allen is right. I mean no one, obviously, wants to come out and defend the bureaucracy. But I think what is happening and what has been happening in this field, and we get this experience over and over again in the individual cases, is that they are trying to protect individual jobs of individual people who work down the hall, and who they see every day and who they have lunch with. Early retirement isn't really seen as a suitable alternative for that. So they decline the contract.

Now I think that's really what's happening. And I think the committee might consider putting pretty strong language in this bill requiring that there not be a declination, absent clear and convincing evidence that an essential trust function is required to be performed by the BIA or IHS. The committee might consider putting in language again, saying to the maximum extent feasible, or unless clearly required otherwise by law, that the contract take place. The committee might consider putting in the report, the expectation that where there are declinations, that those declinations be submitted to your committee and to the comparable House committee, to the Interior and Insular Affairs Committee in the House, so that you can exercise an oversight function.

I certainly know, Senator Evans, that you do not wish to be in the business of being the Assistant Secretary, or being the Director of the Indian Health Service, but this committee has done a marvelous job in bringing this issue to the forefront, and a tremendous service to Indian people. I was Associate Solicitor in the Interior Department when these regulations were drafted in 1975. And they were drafted with good faith and great verve, but they don't get implemented that way. And it's not just a problem of what the standard is, it's really a problem of what's happening out in the trenches. And I can't think of any way to break this kind of old boy network, other than having the administrators know that they've got to submit a reason for the declination and that that reason is going to be reviewed by this committee and its staff in Washington. It would become like the Freedom of Information Act. Government officials become very chary about declining requests when they've got supply reasons for it and when it's going to be reviewed by an impartial body that really has established a track record here for protecting Indian interests.

Those are just my ideas on it, but I would commend the committee for its work on this and strongly urge you, sir, to keep going.

Thank you. I'll answer any questions you may have.

Senator Evans. Surely. Thank you very much.

Let me turn to Mr. Eric Eberhard.

STATEMENT OF ERIC EBERHARD, ATTORNEY, GOVER, STETSON & WILLIAMS, WASHINGTON, DC

Mr. Eberhard. Thank you, Mr. Vice Chairman. I will try to be very brief here. I realize the hour is growing late.

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I would like to start by just commenting on your comment on the consultation process, which I thoroughly agree with, and I think in many respects this bill reflects that very kind of process.

This committee began hearings on amendments to Public Law 93-638 very early this year, with a blank sheet of paper. The committee and the tribes have jointly filled in that blank sheet of paper and I think the bill, as Chairman Allen pointed out, reflects much of the best of the hopes, thoughts and aspirations of the tribes and the committee for what Public Law 93-638 can become.

I'm a little concerned about the notion that we may be in a position now where markup on this may be postponed, or that floor action on it may be postponed based on a request for some additional time to present what are, at least as of today, some rather undefined proposals for further revamping Public Law 93-638 over the next 6 weeks, or 2 weeks, whichever the case may be. Certainly every idea should be considered, but I wonder what the consultation will be with the tribes with respect to further massive revisions of Public Law 93-638 in that short of a timeframe.

I think we have a consensus at this point in Indian country, and indeed with the committee and the administration on several key points that have been problems in Public Law 93-638. I hear either explicitly or implicitly in the comments of Mr. Rhoades and Mr. Swimmer, that there is a agreement that we should get procurement out of Public Law 93-638. Clearly the tribes and the committee agree that that is a worthwhile objective.

I also hear agreement, either explicitly or implicitly that we should get away from day-to-day monitoring of these contracts. That we should move toward a situation where once a year tribes certify compliance. That we should move toward a situation where we can have umbrella contracts to cover many programs. That we should move toward a situation where tribes who have successfully performed for a period of years without major audit exceptions can enter into very long term contracts. Those are all provisions of this bill.

I also hear some agreement, and I appreciate Mr. Rhoades' concerns in this regard, but I hear some agreement that there indeed needs to be great flexibility in the way the United States approaches these contracts.

And finally, I hear explicit agreement that these are ultimately Federal responsibilities with the tribes performing the functions for the Federal Government. And it seems to me that is bedrock when we get to questions like should the Tort Claims Act be applied? Clearly, yes. These are Federal responsibilities. The tribes are carrying out Federal duties. Would we have a situation where the Tort Claims Act applies if the BIA or the IHS is directly administering, but not when the Tribe is carrying out the function? Do we really want a dual standard? Does that promote tribal self-determination, or does it undermine it?

I believe the answers to those questions are very, very clear. Tribes would be carrying out and have carried out under this Act in the past, Federal responsibilities. The Federal Government retains, and I emphasize there is explicit agreement on this, this Federal Government retains ultimate responsibility. The Tort Claims Act should clearly be applied in those circumstances. I would sug-

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gest that the same bedrock principles shed some further light on Mr. Chamber's final point with respect to contracting trust functions. Those functions ultimately are the responsibility of the Federal Government. The tribes are serving as contractors. The responsibility does not shift. These duties are not being abrogated. The responsibilities remain in the Federal Government. The tribes are simply administering those programs for the Federal Government, the duties remain.

There are a few reported case decisions that squarely so hold from the Federal courts. I think that there is now agreement with the administration, the committee and the tribes that indeed those are basic principles in the Public Law 93-638 area. I would suggest that if we return to those basic principles that many of these issues are not issues at all. That they are easily resolved, and that your bill does resolve them fairly and consistently with the underlying purposes of Public Law 93-638.

Those are my comments. I'll be happy to answer any questions you have.

Senator EVANS. Thank you very much. Thank all of you for very important testimony on this bill.

Let me return first to Ron Allen. In talking about indirect costs, and I appreciate what you and your colleagues have done in really a remarkable document. I'm glad we do have it for the record, that is I think at least the best thing I have seen in the field, trying to analyze just what is happening and what has happened in this arena.

With your experience is there, in your view, any kind of a formula base or a formula basis for indirect cost recovery, or is it so individual and so unique to each circumstance that it simply has to be negotiated individually?

Mr. ALLEN. I don't believe that you could come up with a formula, a simplified formula that would be applicable for all tribes. I think that it is unique to each tribe. It is clear that each has very similar line items that are to be incorporated into that rate, and that are supposed to be recovered. But they vary from tribe to tribe.

As an example, one tribe may rent its office facilities. One tribe may have paid for it and they run a depreciation schedule against it. The renter won't have maintenance. The owner, whether they receipt it through an EDA grant or whether they pay for it out of their own tribal funds, or however they accomplish the acquisition of their facilities, they have maintenance. There are different expenses. Some will have legal expenses, and some won't. Now some don't have legal expenses, for example, simply because they can't afford it. They can't incorporate it into it. That's some of the problems where you've got tribes that aren't recovering their full costs. I'm not sure there's a great answer to it. Because as our studies revealed, these are all the items that the tribe should be receiving.

Most tribes aren't receiving them. The larger ones are, but many of them are paying for a lot of the expenses themselves, and most tribes aren't receiving everything they should be receiving. So then you get to each tribe whatever their conditions are, the numbers change. So if you try to create a flat rate, or a simplified system, it's going to hurt different people different ways, or it's going to effect different tribes different ways. Some may benefit. Some may inadvertently get a windfall out of it. I would think many won't. It's not a simple issue.

Senator **EVANS**. Would it, short of a formula basis, and I tend to agree that the complexities are just too great to come up with any kind of a formula, or if you came up with a formula that was adequate, it would be so complex nobody could understand it, but short of that, should there be a sort of book of standards if you will, or some recognition that would be applicable in all cases as to really what does constitute, what are legitimate elements that go into a cost recovery? To what degree do you go into those elements?

You heard Mr. Swimmer, use as an example, with very separate, or very differing cost rates, that one bought a computer and charged it, and one hired a CPA, one had an internal bookkeeper. For certain levels of contracts should we have sort of individual standards that are set up though that you can then develop indirect cost rates?

Mr. **ALLEN**. A great deal of the standards are already in place in terms of what are legitimate items that can be recovered. There are additional items that we have identified in our report that aren't in that. That we've pointed out that need to be identified and need to be incorporated into the cost recovery for support costs for tribes, for contracts.

We think it would be helpful if they can be incorporated into those guidelines, or it can be an addendum of sorts. I'm not sure, at this point, what is the best way to handle that so that all tribes understand all the items that they can and should recover, and also the items that aren't necessarily in the A-87 criteria in terms of identifying, what we can recover.

We explained in our report, you know, the costs that are in the Government's recovery that you don't see, and insurance is a good example, et cetera. But we think that yes, that we should try to create some sort of a document that would be helpful in assisting tribes to understand that what they're supposed to be recovering, you know, so that there's a consistency there.

Senator **EVANS**. Sort of a checklist of items?

Mr. **ALLEN**. Yes.

And then it can vary from tribe to tribe, because it would address it a little differently. But then they would know explicitly that they should be recovering in these areas. That's part of that technical assistance issue that I was mentioning, as well.

Senator **EVANS**. In your view, would a move toward multi-year contracts and long term contracts diminish the kind of work that now goes on in negotiating those indirect cost recoveries?

Mr. **ALLEN**. What——

Senator **EVANS**. Now you have to redo it every year, presumably. If you have multi-year contracts, would that limit the necessity of continued negotiation over indirect cost?

Mr. **ALLEN**. No; that won't. It will help with the streamlining of administering the programs, but it won't make any difference as far as negotiating the rate, because the rate does change every year. I mean it may stay the same. A tribe maybe very fortunate and be able to manage its funds and retain—if it's 35 percent, they can hang onto that 35 percent and they can have real close scrutinous management of those funds.

But tribes will vary with their contracts and grants each year. They may get a grant from a foundation that will allow indirect costs. They may get a grant from HUD or whatever that will allow a certain portion of it. So they end up with these constant adjustments each year.

Senator **Evans**. But with a single contract, if you have a particular contract where let's say a mature contract can be for an extended period of time, isn't it possible to negotiate a multi-year indirect cost element to the contract as well?

Mr. **Allen**. Oh, I think it would be possible, yes. If the Inspector General would allow it. I don't know if they have ever done that. It would have to be coordinated with I would think OMB and the Inspector General's Office.

Yes; that would be helpful. We are heading in that direction now. The grandfathering process is forcing us, in essence, to try to keep a stable indirect rate, so that there is consistency there, and so we're headed in that direction anyhow. And if the Inspector General would allow us to negotiate that kind of rate with each of those specific contracts, then that's workable. I mean, basically what you end up with there is a multiple rate, and that's doable. That's not as complicated as it sounds.

Senator **Evans**. Well, what I was trying to get at is that I know Mr. Swimmer has pointed out that his attempt to move toward a single rate is to simplify the process, which is very tedious and cumbersome right now, but even if you negotiated them separately, as you suggest is necessary, if we can move toward multiple year contracts and multiple year, potentially multiple year agreements on indirect cost recovery, that simplifies some of the process, and would at least——

Mr. **Allen**. That would simplify it, yes.

Senator **Evans**. I see they've got another vote on for us, but I think we can finish.

Mr. Chambers, first on the Pandora's box argument, I thoroughly agree with you, and that's one over the years that I've grown to find distasteful. People who don't understand that when they come in and tell me they're against a piece of legislation or for a piece of legislation because of the precedent it set or what might happen, I get turned off immediately. Because I think we have to deal with legislation as it is. And for the purposes we design it. And some can say, well that opens the door for somebody else. Well, let them come forward and if they want legislation, we have to deal with that individually and separately. So I hope that what we do here—at least I don't intend to push anything aside because of a fear that it somehow might open the door to somebody else.

Do I understand essentially what you're saying is that in the negotiation of contracts and in the determination of them that it really ought to essentially be the burden of proof be on the Government to say that you're not capable rather than the other way around, the tribe proving that they are capable?

Mr. **Chambers**. Yes, Mr. Chairman. That's—and I think the committee probably needs to—I had thought that was in the 1975 act, and I had thought it was in the 1975 regulations, but I think we didn't properly anticipate then the friction within the bureaucracy when it comes to the individual cases that come before them.

So I would suggest that the committee might well want to write it in in language that simply isn't susceptible to any other interpretation. Mr. Chairman, that was my suggestion. Because we just meet these things out in the field, where there doesn't seem any rhyme or reason for it. And if the officer in the area office in some distant part of the country knows that a declination will be reviewed by this committee, then it's going to end up being reviewed in Washington. They're going to be much more reluctant to turn it down. They're going to have to give reasons for it that make sense. They don't do that always now. They just don't.

Senator **Evans**. It sort of boggles the mind of the committee, however, having to face up to that responsibility.

Mr. **Chambers**. I know that, Mr. Chairman.

Senator **Evans**. Somehow we'll see what—we ought to work on that and see what we can do, or what we can say that makes very clear what the intent is and where the burden of proof ought to be on these declinations.

Mr. **Chambers**. I think if you threaten them, Mr. Chairman, you will find that they won't be declining contracts that are going to come before you. [Laughter.]

Senator **Evans**. That may well be.

On the liability policy problems, has anyone considered, or do you think it's conceivable to consider a master liability policy that would cover either all or a major share of tribal contractors, rather than having to deal independently or separately with them?

I understand that HUD and other agencies sometimes do that in their housing authorities and other agencies are attempting to do the same thing.

Mr. **Chambers**. Well, Mr. Chairman, HUD has recently set up a self-insurance pool for all the Indian housing authorities. Or really the National American Indian Housing Council has done that, and HUD has approved it.

That doesn't remove the problem of paying the premiums though.

Senator **Evans**. Yes.

Mr. **Chambers**. I mean then what happens is each housing authority pays the premiums that they would have otherwise have paid to an insurance company and pays it into the pool. So it wouldn't alleviate the problem of, if $4 million per year is the correct figure, it wouldn't alleviate the problem of the $4 million per year being paid. It would mean it would get paid into a self insurance pool, rather than to a private insurance company, and that might be more effective or it might not be. I'm not an expert on that.

I do believe that the housing authority pool has worked well. It's been in effect for about 1 year. But I don't think it alleviates this problem. This problem, as Mr. Eberhard was saying, that the bedrock truth is that the performance of this health care function is a Federal responsibility. And for that reason that the people who are performing it, if they're Indian tribes or tribal organizations, ought to have the same protection that the Federal Government has when it performs it, and ought not to be required to pay $4 million per year.

Senator **Evans**. Or go into any kind of an insurance responsibility, we just put them on the same basis as direct employees of the Federal Government?

Mr. **Chambers**. In terms of the Tort Act coverage, Mr. Chairman, that's certainly our strong proposal.

Senator **Evans**. Do you care to comment on—on page 9 of the bill, we authorize adequate liability insurance, and then we go into the question of limits on sovereign immunity. Perhaps you'd like to maybe comment for the record as to whether we need to go further than we have in the act so far in this question as a way of reducing costs? It's on page 9 of the printed bill, and I'm not sure you have the same bill.

Mr. **Chambers**. Well, Chairman Allen has been good enough to supply me with a copy—I think we've got the right provision.

Senator **Evans**. It's section 201 and C(1).

Mr. **Chambers**. I'd noticed this actually reading through the bill in preparing last week for this testimony.

Mr. Chairman, the committee I suppose could make this judgment. It's policy judgment for you. It's your judgment I have a preference on it, but I don't know that it's clear how it should come out.

One possible judgment would be to allow a tribal organization to interpose their sovereign immunity from suit on any medical malpractice claim.

Senator **Evans**. Yes.

Mr. **Chambers**. What the bill currently does is that it provides that the United States will be liable under the standards of the Tort Claims Act. So that if a tribal contractor does commit medical malpractice, the United States will pay the injured plaintiff.

Another logical possibility would be to say that the tribe can assert its immunity from suit and nobody pays the injured plaintiff. And that's a policy judgment which, I think, is your judgment.

My preference is that the injured plaintiff ought not to be the one that bears the burden. That if someone bears the burden, the United States ought to bear the burden. Not just because the United States has a deep pocket, but because there is a Federal function being performed. There is an important health care function being discharged. The United States has decided that a particular tribal contractor is qualified to perform that function, otherwise they wouldn't contract with them. And that the United States ought to compensate someone who is injured.

Either way is better than the present system, where millions of dollars of program costs get diverted to paying insurance premiums, and I would point out, Senator, at least that the history is that they're not massive negligence claims against tribal contractors. That's not been the experience. So that I don't think there's reason for great concern about opening up the Treasury of the United States in this respect.

Senator **Evans**. Mr. Eberhard, first let me guarantee you that as far as further consultation with the tribes, that we've come this far building an act, and we don't intend to stop. There will be, as far as this Senator is concerned, I'm sure the chairman is concerned, we will continue that. We hope that the initial act as introduced was a good start, but recognize like in the case of most acts, it can always be improved, but we'll want to improve it collectively rather than separately.

One question. The IHS apparently has proposed the use of grants or cooperative agreements as an alternative for contracts. Do you have any comments on potential tribal concerns over grant and cooperative agreements as instruments for carrying out these functions?

Mr. **Eberhard**. Well, that takes us right back into the whole question of how do you define these Public Law 93-638 contracts. There is an existing body of Federal law, primarily codified in title 41, that defines the use and the appropriate use of contracts, grants and cooperative agreements. There was an effort here in the Congress in 1984, to broaden out Public Law 93-638, at least insofar as it had theretofore not included cooperative agreements, to include cooperative agreements.

That was, I think, a good effort. The problem is that it still did not recognize that fundamentally this law is talking about a different kind of an arrangement than we are talking about when the United States goes out and procures goods or services in any other context, whether that's for its direct use, or for the benefit of the citizens of a State, whatever it may be. That fundamentally what we're talking about here stems from a Congressional policy that happily the Executive by and large has shared over the years, that tribal self-government should be promoted. One way to do it is to elevate, if you will, the role of tribal government in providing Federal services to the citizens, or the members of those tribes.

That's a wholly different proposition than you find in any other aspect of Federal policy. I think that will be the difficulty if all we do is once again say to IHS or BIA, you can either contract it or you can grant it, or you can do it through a coop agreement. The people, at least in middle management, in those agencies are going to say, well now that takes us back to title 41, and title 41 says we have to do these things this way. The next thing you know instead of a direct, straightforward transfer of function and dollars to provide those functions, what we're going to have are contracts that extend for hundreds and hundreds of pages incorporating unnecessary Federal law, and actually running counter to the purpose which you're trying to accomplish here, which is promoting tribal self-government.

Senator **Evans**. Well put. That's probably a pretty good place to stop. [Laughter.]

We have 3 minutes to vote, but that is well put. And it's an attempt, which I guess now has gone on for at least 12 years since President Nixon's statement, and we're still struggling to find the right way to fully and most straightforwardly implement that concept. That's what this bill is all about in attempt to move in that direction. We'll depend on your help and the help of everyone else who has testified to try to get us there in the best fashion we can.

We still do intend to have the markup on the 21st. We hope that we will have as much information, and as much help both from the government and others, between now and then to make the bill as good as we can make it as it leaves the committee, but understand that if there is further work needed after that time, we obviously will have time for it before we get to the floor.

Thank you very much, all of you, for coming.

Mr. **Allen**. Thank you, sir.

Mr. **Chambers**. Thank you.

Mr. **Eberhard**. Thank you.

Senator **Evans**. The hearing is adjourned.

[Whereupon, at 12:45 p.m., the committee was adjourned.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY - INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE HEARING OF THE SELECT COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987".

October 2, 1987

Mr. Chairman and members of the Committee, I am pleased to present the views of the Department of the Interior on S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987".

We could only support S. 1703 if it were amended to address our concerns as detailed in this testimony. We plan to submit an alternative proposal for amending the act in the near future.

Before dealing with some of the specifics involved in tribal-BIA contracting I believe it is appropriate to step back for a moment to consider what we wish to accomplish. The enactment of the Indian Self-Determination Act in January of 1975 was the end result of President Nixon's July 1970 Message to the Congress on Indian Policy which called for tribes to be given the opportunity to assume responsibilities and control over programs operated for their benefit by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS).

We now find ourselves in what sometimes seems to be a quagmire of conflicting laws, rules, regulations and policies trying to carry out what was a fairly straight forward and clear objective in President Nixon's Message, that is to transfer responsibility and funds at the tribes request to operate federally funded programs intended for their benefit.

Most of the problems are associated with the mechanism used in providing the tribes with the Federal funds. Apparently, in response to concerns that the turn over of programs and services to tribes could be followed by a cut off of the Federal funding, contracts were chosen as the mechanism for those turnovers. The reasoning apparently was that contracts are used in connection with a Federal agency's carrying out a Federal responsibility while grant agreements are associated with Federal aid in carrying out someone else's responsibilities and cooperative agreements are used in jointly carrying out a responsibility. Therefore, it apparently seemed to follow that the use of contracts provides a basis, or an additional basis, for continued Federal funding because it is clearer that Federal responsibilities are being carried out.

I do not believe that the use of the term "contract" provides any assurance against budget cuts or any guarantee of continued funding. It is notable that in the budgeting and appropriations process for BIA, no distinctions are made between contracted and non-contracted funds, nor is special consideration given to the degree to which a given program is contracted. However, the use of the contract mechanism has unintentionally caused the development of problems. Among the problems at least partially due to the contracting mechanism are the unproductive and time consuming annual renewal or recontracting process and the delays in the determination of contract amounts while final appropriation amounts are being determined and allocated in accordance with Appropriations and Conference Committee Reports.

Another problem is the BIA's need to monitor the contractor while the contract is being carried out because of the BIA's continuing responsibility to ensure compliance with detailed contract terms. To be able to do this the BIA may retain part of the budgeted funds for program operations that might otherwise be included in the contract amount.

Still another problem is indirect cost determinations, budgeting and funding for indirect costs, and the spiral of debt that can afflict tribes due to theoretical overrecoveries of costs. This problem is further complicated by tribal governments' dependence on the use of indirect cost funding to support more of a tribal government's expenses than the expenses the tribe incurs solely because of the contract.

One way of trying to deal with these problems is to continue to try to modify the Federal contracting mechanism to streamline it and make it more in line with the purpose intended. This is what S. 1703 is intended to do, and the attachment to my prepared statement provides our detailed comments on that bill. However, it is increasingly obvious that contracting is too unwieldy to promote true self-determination. For this reason I believe that a more basic change may be needed and that the time is appropriate to actively consider it. We are currently developing an extensive legislative proposal to fix what we view as the problems with P.L. 93-638. We plan to submit our proposal to the Congress within the next six weeks. We respectfully request that the Committee withhold action on S. 1703 until it has the chance to review our proposal.

I realize that a basic restructuring of P.L. 93-638 would be a tremendous undertaking, with actual implementation requiring several years, but I am convinced that our experience makes it clear that we have created too many barriers to true self-determination by relying on the mechanism of contracting. There must be incentives for tribal governments to run their own programs and for the BIA to transfer the programs through a sensible and manageable system. I do not believe that a few amendments to the existing law will solve the problems; it is time to consider a new process. We would be pleased to work with the Committee in consultation with Indian tribes, to develop legislative provisions along the lines I have outlined we will be proposing.

This concludes my prepared statement and I will be pleased to respond to the Committee's questions.

DEPARTMENT OF THE INTERIOR DETAILED COMMENTS ON S. 1703, THE "INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT AMENDMENTS OF 1987".

1. We have no comments on section 101 of S. 1703 which provides the short title and a table of contents for the bill.

2. Section 102 modifies the declaration of policy now in section 3(b) (25 U.S.C. 450a(b)) of the Indian Self-Determination and Education Assistance Act (hereinafter referred to as "the Act") to clarify that the Federal responsibility is to "individual Indian tribes and to the Indian people as a whole" rather that to "the Indian people". It also adds "In accordance with this policy the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." We have no objections.

3. Section 103 amends section 4 (25 U.S.C. 450b) of the Act to add eight definitions and change a definition.

The term "construction programs" is added and defined to mean "programs for the planning, design, construction, repair, improvement and expansion of buildings or facilities but not limited to, housing, sanitation, roads, schools, administration and health facilities, irrigation and agricultural works and water conservation, flood control, or port facilities".

(a) The word "including" is apparently missing after "facilities" the first time it appears (page 3, line 13).

(b) The definition apparently extends to activities usually considered as operation and maintenance of facilities as distinguished from true construction and renovation. We believe that the ongoing operation and maintenance of facilities is and should be contractible under the Act.

(c) The definition is included because of a later amendment (page 7, line 2) to section 102 of the Act to expressly include "construction programs" as contractible under the Act. Although we support the concept of allowing tribes to contract for the planning, design, and construction of projects, we believe such contracting should be done as a business activity so the tribe could make a profit and manage the contract appropriately. Contracting for construction under P.L. 93-638 is really not appropriate since it is designed to enable tribes to operate on-going programs whereas construction projects for a given tribe are infrequent and limited in duration. Moreover, contracting construction under P.L. 93-638 with all the attendant complexities of indirect cost-negotiation and payment would inevitably result in cost inflation. This inflation would reduce the amount of construction that could be done to benefit Indian people.

4. Sections 103 also amends section 4 of the Act to provide definitions for the terms "contract costs", "contract funding base", "direct program costs", "indirect costs", and "indirect cost rate". These terms are dealt with in connection with the sections where the terms are use.

5. Section 103 also amends section 4 of the Act to define the term "mature contract" (page 4, line 19) to mean "a self-determination contract that has been continuously operated by an Indian tribe or tribal organization for three or more years, and for which there has been no significant and material audit exceptions in the annual financial audit of such Indian tribe or tribal organization".

This definition includes the first two of several uses in the bill of the phrase "Indian tribe or tribal organization". Section 4(c) (25 U.S.C. 450b(c)) defines the term "tribal organization" to include "the recognized governing body of any Indian tribe". Therefore, the phrase "Indian tribe or tribal organization" is redundant and the term "Indian tribe" need not be added when the term "tribal organization" is used. See also page 5, line 12; page 6, line 24; page 7, line 1; page 8, lines 1, 14 and 18; page 9, lines 1, 2, 4, and 9; page 11, lines 6 and 11; page 12, line 20; page 13, lines 8, 13, 15, and 21; page 14, lines 3, 11, and 13; page 15, line 2; page 16, lines 16 and 23; page 17, lines 2, 7, 15, and 24; page 18, lines 4 and 24; and page 20, line 17.

6. Section 103 changes the definition of "Secretary" in section 4 of the Act to read "unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both". For clarity we recommend that the definition read as follows: "'Secretary' unless otherwise designated, means the Secretary of Health and Human Services or the Secretary of the Interior, as appropriate in the context". This will avoid the possibility of questions as to whether the consolidated section 102 of the Act in section 201 of the bill can be interpreted as requiring one Secretary to contract with a tribal organization for the operation of an activity assigned by law to the other Secretary.

On page 5, line 4 the word "it" should be inserted before "as".

7. Section 103 also amends section 4 of the Act by adding a definition of the term "self-determination contract" to mean "an intergovernmental contract entered into pursuant to this Act between an Indian tribe or tribal organization and an agency of the United States for the purpose of assuring Indian participation in the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: Provided, That no intergovernmental contract shall be construed to be a procurement contract".

(a) The definition uses the new and undefined term "intergovernmental contract" and the term is not used elsewhere in the bill. Under the Act as it now stands and as it would be amended by S. 1703, contract are to be entered into with "tribal organizations" which is defined to include other than governmental organizations including apparently even urban Indian organizations (see page 10, line 15 of the bill). Therefore the term "intergovernmental contract" is not appropriate unless the bill is amended as we recommend to limit contracting under the Act to tribal governments but permitting them to subcontract if they so choose. If that recommendation is accepted, the term "intergovernmental contract" or "intergovernmental self-determination contract" might be substituted for "self-determination contract".

(b) The definition refers to entering into contracts with "an agency of the United States" whereas under the Act and under S. 1703 the contracts are limited to those entered into by the "Secretary". We recommend that the definition be amended to conform to the authority in the Act.

(c) We strongly support the idea in the proviso that contracts under the Act are not procurement contracts, although we note that the proviso does not change the fact that retaining the contracting mechanism still requires funding with numerous strings attached.

8. Section 104 amends section 5 (25 U.S.C. 450c) of the Act to require the appropriate Secretary to have regulations for contract reporting requirements. Mature contracts (multi-year contracts) shall only be required to provide quarterly financial statements, an annual single-agency audit, and a brief program report.

We do not object to having regulations for contract reporting requirements and we strongly support minimizing reporting requirements. We note that the citation to the APA provision should be to section 553 of title 5, United States Code.

9. (a) Section 201 of S. 1703 restates section 102 of the Act by consolidating into one section the authority now in sections 102 (BIA) and 103 (IHS) (25 U.S.C. 450f and g). We have no objection to the consolidation of the section 102 and 103 provisions if the clarifying amendment in item 6 above to the definition of "Secretary" is made.

(b) We strongly object to the extension to "tribal organizations" of the right to require the Secretary to enter into a contract. (See page 6, line 24 and page 8, line 1.) This is a serious and counter productive weakening of tribal government authority. Under the Act as it now stands that right is reserved to Indian tribes acting through their tribal governments. Under the Act tribal governments determine which tribal organizations are to enter into the requested contracts with the Secretary. As we have indicated before, we believe that it is essential that the tribal governments have the authority and responsibility for the programs and services that are contracted or otherwise transferred from direct Federal operation. Otherwise, we risk confusion of roles and duplication of services.

(c) As amended by section 201, section 102(a)(1) otherwise tracks existing law providing for contracting to plan, conduct, and administer programs (or portions thereof) under the Johnson-O"Malley Act of 1934, the Snyder Act of 1921 "and any Act subsequent thereto", and the Indian Health Transfer Act of 1954 and adds express authority (which we have assumed existed under the Act) for contracting programs administered by the "Secretary" for which appropriations are made to other Federal agencies. It also expressly extends the Act to "any program, or portion thereof, for the benefit of Indians without regard to the agency or office of * * * the Department of the Interior within which it is performed." We have no objection to this extension. However, the provision includes authority for construction contracting and, as indicated in item 3(c) above, we strongly recommend that such contracting be authorized instead under the Buy Indian Act.

(d)(1) The amended section 102(a)(2) requires the Secretary to accept a "proposal" for a contract within 90 days of receipt unless the Secretary makes one of three findings. The three findings are the same as the three current declination criteria under the Act. We assume the "proposal" is the same as the "request" under section 102(a)(1). If so, the same term should be used in both instances. If not, the provisions should be clarified to indicate the relationship of a proposal to a request. We do not object to the 90 day requirement.

(2) The amended section 102(a)(2) omits the factors to be considered in arriving at a finding, i.e., whether there would be a deficiency in performance with respect to equipment, bookkeeping and accounting procedures, substantive knowledge of the program to be contracted, community support for the contract, adequately trained personnel, or other necessary components of contract performance. We have no objection to omitting these factors to be considered because we believe that the allowable finding provide adequate protections against improvident contracts. However, we do recommend that an additional finding be added to clarify that requested contracts are subject to the availability of funds for the program or portion thereof involved and that the Secretary is not required to divert funds from BIA operated programs or portions thereof serving other Indians to funds the requested contract.

(f) Section 102(a)(3) on page 8, line 14 appears to be an unnecessary restatement of section 102(a)(1).

(g) We have no objection to the section 102(a)(4) provision allowing the consolidation of two or more mature contracts into a single contract.

(h)(1) Section 102(b) is based on the current section 102(b) of the Act except that it imposes a sixty day maximum period for action. It apparently allows the Secretary sixty days to notify a tribe of the reason for the Secretary declining to enter into a contact requested under section 102(a). The sixty days would seem to start running on the date the Secretary declines during the new limit of ninety days allowed in section 102(a)(2) described above.

(2) Also within that sixty days the Secretary is to provide assistance to the tribe to overcome the reasons for the declination. The ability to provide the assistance depends on the nature of the declination reason and the availability of appropriations to provide the assistance. We assume that it is not intended that our authority to provide the assistance expires at the end of the sixty days and we suggest that the provision be amended to require the initiation of assistance during the period.

(3) Finally, within the sixty days the Secretary is also to provide the tribe with a hearing and an opportunity for an appeal.

(i) The amended section 102(c)(1) on page 9, line 8 restates the current authority (see 25 U.S.C. 450f(c)) the Secretary has to require contracting tribes to carry liability insurance. It however modifies the current prohibition against an insurance carrier raising the tribe's defense of sovereign immunity to the extent of the insurance coverage by permitting the defense to be raised "for liability for interest prior to judgment or for punitive damages". We have no objection to this provision.

(j) We object to the Federal Tort Claims coverage under section 102(c)(2) of the bill, and defer to the Depart ofJustice to present the rationale.

10. Section 202 (Technical Assistance and Grants to Tribal Organizations) of the bill adds a new subsection (d) to the current section 104 (25 U.S.C. 450h) of the Act. The new provision requires the Secretary, on a non-reimbursable basis, to provide technical assistance to tribes and tribal organizations to develop and modify proposals to contract a program. Although we have no objections to this requirement we suggest it be clarified to state that it is subject to the availability of appropriations.

11. Section 203 (Personnel) amends the current section 105(e) (25 U.S.C. 450i(a)) of the Act to make permanent the authority to allow Federal employees who transfer to tribal employment to retain civil service benefits if the employee and the tribe so elect and the tribe agrees to pay the employers share of the costs of those benefits. While a reasonable extension of current law would not be objectionable we believe that it would be unwarranted to make this provision permanent at this time.

12. (a) Section 204 (Administrative Provisions) the current section 106(a) (25 U.S.C. 450j(a)) of the Act to exempt contracts under P.L. 93-638 from the Federal procurement law and Federal acquisition regulations. We strongly support such a provision. These contracts are not intended to be Federal procurement contracts.

(b) Section 204 restates the current section 106(c) (25 U.S.C. 450j(c)) to allow the use of multi-year contracts for 3 years in the case of new contracts and up to five years for mature contracts "unless the appropriate Secretary determines that a longer term would be advisable". As under current law, the amounts of the contracts would be subject to the availability of appropriations and could be renegotiated annually to reflect unforeseen circumstances. We support the idea of multi-year contracts.

(c) Section 204 also restates section 106(d) (25 U.S.C. 450j(d)) of the Act. The restatement omits our authority to amend contracts to increase amounts payable without having to find an increased benefit to the Federal Government. It also changes maximum period for the acceptance by the Secretary of a retrocession from 120 days to one year. We oppose the first of these changes because it may prevent us from providing necessary aid to a tribal contactor under the Act. We support the latter change because we need adequate time to budget and provide staff to take over a tribally run program. The one year lead time would allow for a more efficient transfer.

(d) Section 204 restates current section 106(e) (25 U.S.C. 450j(e)) to provide the Secretary authority to transfer title of excess Federal property and to acquire excess Federal property for donation if it can be used for a purpose for which a contract is authorized under the Act. We support this provision but recommend that the Act be further amended to require a tribe to return property used in connection with a program or portion thereof which the tribe retrocede to the Secretary or in case of a recession of the contract under section 109 (25 U.S.C. 450m) of the Act unless the Secretary declines the return of the property.

13. (a) Section 205 (Contract Funding and Indirect Costs) adds a new section 106 to the Act (the old section 106 having been redesignated as section 105) which incorporates the current section 106(h) (25 U.S.C. 450j(h)) of the Act and new provisions. It requires the Secretary to provide funds for all "contract costs" incurred in connection with the contract but shall not be less than the Secretary would have provided for the Secretary's operation of the program. Any savings may be used for additional services under the contract. Funds provided for such contracts cannot be reduced (1) to provide funds for new contracts under the Act, (2) to provide funds for costs of the Federal agency including those for contract monitoring, ADP, technical assistance, or personnel costs such as costs for Federal employees displaced by the contract.

Under Section 106 (a)(5), funding could not be reduced unless there is a reduction in Congressional appropriations from the previous fiscal year for programs to be contracted. This provision would not be cost effective, as many programs are funded under the Indian Priority System (IPS), which is a budget line composed of numerous increases and decreases based upon tribal decisions. Although the IPS portion of the budget may not show an overall decrease, many decreases may be included in instances where tribes have assigned a lower priority to programs and reduced funding accordingly. Under this provision of the proposed legislation, however, the Bureau would be required to maintain the same level of funding in such cases. Also, in some programs, in which tribal projects have been completed (such as facilities improvement and repair projects or minerals inventory surveys) additional funds should not be provided to the tribe, regardless of the amount of the appropriation. Given these circumstances, we must object to this provision.

We agree with the provision of not providing contract money for BIA monitoring of the contracts if we read the this to mean that the BIA should not be monitoring contracts. We believe we should be out of the day-to-day monitoring business and should be looking at a year end review to see if the services contracted for were provided. Tribes should be required to provide certification of their program audits and monthly financial reports showing expenditures. We do not believe a day-to-day monitoring of the contract is necessary for either the tribe or the BIA.

(b) Section 205 also requires in the new section 106(b) that the Secretary annually submit to the Congress detailed reports on the direct and indirect cost amounts provided and budgeted for contracts under the Act. The information required is not now compiled but could be in the future if we are allowed to proceed with our ADP and management information systems development. We would be pleased to work with the Committee's staff to develop a reporting requirement that we can comply with on a reasonable prompt basis without an undue diversion of resources from programs serving tribes and their members.

(c) Section 205 provides a new section 106(c) that holds tribes harmless for providing the difference in indirect cost rates actually provided and the amounts that would have been provided at 100 percent of their indirect cost rate in subsequent fiscal years for Federal programs (other than BIA and IHS) that provide funding to the tribes.

Although we believe that tribes should be provided whatever indirect cost rate is provided to other contractors under various Federal programs and that those funds should be made available by the individual agencies, this issue is essentially one of what is referred to as "theoretical over-recovery". We do not believe that tribes should be penalized because of a theoretical over-recovery.

(d) Section 205 adds a new section 106(e) that requires the Secretary to give notice of any disallowance of costs within a year from receiving an audit report. An appeal plus hearing shall be provided. If notice is not given within one year, any right of action or other remedy relating to the disallowance is barred. We do not object to this provision but would like to work with the Committee's staff for clarification of exactly when the year begins.

(e) Section 205 adds a new section 106(f) that requires the Secretary to publish in the Federal Register a notice of intent to remove or alter any program in the Indian Priority System at least 90 days prior to removing or altering the program and to include a statement on the impact on funding levels for "each Agency and tribe affected." This restriction would severely affect the Bureau's capability of making timely decisions which may be critical for the benefit of the tribes. For instance, removing the road maintenance program from the IPS will insure that roads are maintained consistently Bureau-wide, thereby meeting the standards required for obtaining badly needed Federal Highway Trust Fund dollars. The restrictions contained in this proposed bill will require the Bureau to undertake a long and cumbersome process in cases where timely decisions and flexibility is critical.

(f) Section 205 adds a new section 106(g) that requires the Secretary to add the indirect cost funding to the contract if requested by the tribal contractor. The combined amount shall be included in the contracting agency's budget. We would not object to a lump sum approach to determining appropriate contract support costs but disagree strongly with this provision.

Under Section 106 (g), contract support costs would in essense be "grandfathered" into the budget. This section provides that the indirect costs determined for tribal contracts would be added to the direct program funding amount and carried in the budget under the direct program line for each subsequent year the the program remains contracted. The Bureau has implemented this method in the past, under Congressional direction, resulting in inequitable funding of these contract support costs from tribe to tribe.

14. (a) Section 206 (Contract Appeals) adds a new section 110(a) to the Act (the current section 110 being redesignated as section 111) that provides Federal district courts with original jurisdiction concurrent with the Court of Claims for claims arising under the Act or under contracts authorized by the Act. We recommend that the Committee's staff consult with the Department of Justice concerning this provision.

(b) Section 206 also adds a new section 110(b) prohibits the United States from unilaterally modifying contracts but also provides a means for doing so. We would be glad to work with the Committee's staff to clarify the intent of this provision.

(c) Section 206 also adds a new section 110(c) that provides for the Equal Access to Justice Act (the Act of October 1, 1980, 94 Stat. 2325) to apply to administrative appeals by Indian tribes and tribal organizations regarding P.L. 93-638 contracts. This would provide for the possible award of attorney fees in cases where the tribe prevails in the appeal. We object to this provision.

(d) Section 206 also adds a new section 110(d) that provides for the Contract Disputes Act to apply to P.L. 93-638 contracts. A recent court decision ruled that these contracts were not under the Contract Disputes Act. As stated above, if we do not view these contracts as procurement contracts, then they should not be subject to the Contract Disputes Act.

15. Section 207 (Savings Provisions) is the same as the current section 110 (25 U.S.C. 450n) of the Act. We have no objection to it.

16. Section 208 (Severability) is self explanatory. We have no objection to it.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

STATEMENT
ON S. 1703
THE INDIAN SELF-DETERMINATION AMENDMENTS OF 1987

BY

EVERETT R. RHOADES, M.D.
DIRECTOR
INDIAN HEALTH SERVICE
PUBLIC HEALTH SERVICE

BEFORE THE
SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS

October 2, 1987

Mr. Chairman and Members of the Committee

I am Dr. Everett R. Rhoades, and I am the Director of the Indian Health Service (IHS). I appreciate this opportunity to testify on S. 1703, a bill to amend the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638). I am accompanied this morning by Mr.Douglas Sakiestewa, Director, Division of Grants and Procurement; Dr. Robert C. Birch, Acting Director, Division of Indian Resources Liaison; and Mr. Richard J. McCloskey, Director, Division of Legislation and Regulations.

IHS is the Federal agency charged with administering the principal health program for American Indians and Alaska Natives. At present, the IHS provides comprehensive health services to approximately 1,000,000 Indians and Alaska Native people. The goal of the IHS is to raise the health status of American Indian and Alaska Native people to the highest possible level. Its mission is threefold: (1) to provide or assure the availability of high quality comprehensive, accessible health services; (2) to provide increasing opportunities for Indians to manage and operate their own health programs; and, (3) to serve as a health advocate for Indian people.

Since the transfer of Indian health programs from the Department of the Interior to the Public Health Service in 1955, this comprehensive health delivery system has evolved into three modes of delivery. First, the direct health services delivery system, which is administered directly by IHS staff, provides services through the operation of 45 hospitals, 71 health centers, and several hundred smaller health stations and satellite clinics. The second mode is the tribal health delivery system, which is administered by tribes and tribal organizations through contracts with the IHS, and which represents Indian self-determination.

These tribal organizations operate 6 hospitals and approximately 250 health clinics. As you know, the administration is implementing a comprehensive strategy for the next decade to expand opportunities for tribal operation of IHS hospitals and clinics. The third mode is the purchase of medical care by either IHS or tribes from providers serving the general population.

The primary method provided by Congress for the Indian people to exercise maximum participation in the management of these health systems is the Indian Self-Determination Act, P.L. 93-638. It provides tribes with an option to freely choose to either take over management of most Federal programs serving them or to retain Federal management of their programs. The tribes that choose not to take over management of their health programs from the IHS are not penalized for their decision. In our view, a tribal decision not to contract is equally an expression of Indian self-determination. In either case, a continuing Federal responsibility is required. These considerations are also consistent with our renewed commitment to advance self-determination in the operation of IHS hospitals and clinics.

In programs contracted to tribes under P.L. 93-638, the IHS continues its exercise of Federal responsibility for health care by assuring achievement objectives such as a high quality of care. The statutory option of a tr retrocede or the responsibility of the IHS to reassume programs where th are serious deficiencies, requires the IHS to maintain a continuing relationship with the tribal contractors and to maintain the capacity to reassume a program when either retrocession or rescission is utilized.

In addition, the IHS must maintain an appropriate structure and the resources to assure the delivery of the highest possible level of health care to tribes who choose not to contract for operation of IHS programs as well as to those who do.

I believe that the development of self-determination under P.L. 93-638 has been successful. This is not to say that it is either easy or without controversy or disagreements. That it is working is demonstrated by the fact that as of September 1987, IHS was administering 420 active P.L. 93-638 contracts. For FY 1987, the P.L. 93-638 contract support provided by IHS is approximately $180 million for the Service Appropriation. For FY 1987, P.L. 93-638 construction contracts, including FY 1986 carryover, represents approximately $13 million of our construction appropriation as we work with tribal organizations on our new initiative, we expect to see these numbers grow rapidly in the coming years.

TRIBAL HEALTH PROGRAM MANAGEMENT COSTS

In the 12 years since the passage of P.L. 93-638, the IHS has made significant progress towards the IHS mission of providing increasing opportunities for tribes who choose to manage and operate their own health programs. When a tribe contracts a program under P.L. 93-638, tribal costs (both program and administrative) are funded from the total amount identified as available to IHS to support the contracted program.

Tribes, however, will have administrative costs over and above what it costs the IHS to administer the program at the service unit level. These can be referred to as tribal health program management costs. For example, the government is a self insurer, but if a tribe contracts an IHS function under P.L. 93-638, the tribe must purchase liability insurance (e.g., malpractice insurance). Tribes will also have other costs, e.g. legal services, additional data processing, financial management, personnel management, etc., all of which are allocable to the P.L. 93-638 contract program. In addition, we recognize that there are certain corporate costs which tribal contractors incur because of their operation of health programs, e.g., meetings of the health board, director's liability insurance, education and training of board members, and planning. These also must be accommodated. Collectively, these costs are often referred to as "indirect" costs. We believe that these justified costs should not be handled as "indirect" but as direct costs of self-determination, and we have devised resources allocation systems, described below, to do this.

In recognition of these additional administrative and executive direction costs, the House allowance for the FY 1988 budget proposes an increase of $6,000,000 for "tribal contractor indirect costs short fall" and the Senate version calls for $3,000,000 for this purpose. Both versions propose to establish a $2.5 million Indian Self-Determination fund--as requested in the President's FY 1988 budget--for the transitional costs of initial or expanded tribal contracts.

ALLOCATION OF RESOURCES

As a result of 12 years' experience, the IHS and tribes have identified certain difficulties associated with the implementation of P.L. 93-638 and have, by working together, made significant progress in overcoming many of these difficulties. The IHS has aggressively pursued various administrative changes, and more are underway, to simplify and streamline the P.L. 93-638 contracting process and to ensure that resource allocation is both rational and equitable.

I would like to take this opportunity to tell you about some of these activities.

1. The IHS has carefully considered the information obtained in nearly 18 months of intensive tribal consultation including two pilot projects in which the Mississippi Band of Choctaw Indians and the Norton Sound Health Corporation helped in the initial development of improvements in resource allocation, two national IHS/tribal workshops (July 1986 in Reno and October 1986 in Tulsa) with nearly 300 participants in each, about 100

IHS/tribal meetings in the various IHS Areas, and a 120-day public comment period. As a result, the IHS issued its "Statement of Policy - Resource Allocation Methodology" on March 2, 1987. The IHS held a third national IHS/tribal workshop later that same month in Tulsa, referred to as Tulsa II, with about 400 participants, of which nearly 300 were Indian people. A major topic at the workshop was discussion of, and further orientation to, the Resource Allocation Methodology.

2. The purpose of the Statement of Policy is to establish a Resource Allocation Methodology (RAM) which the IHS will use to allocate its resources on a reasonable, rational, and equitable basis. The RAM will enable the IHS to evaluate IHS and tribally operated health programs on a relative scale according to need and performance to achieve a more rational and equitable distribution of IHS resources.

3. The IHS will use the RAM to:

   A. Allocate IHS resources reasonably, rationally, and equitably among IHS service programs. Our goal is to eliminate unreasonable disparities in service programs available to Indian people, and to promote efficient and effective use of resources appropriated for their health care.

   B. Assure that funding provided by IHS is determined on the same basis for both IHS and tribally operated health programs.

C. Promote the IHS goal of raising the health status of Indian people to the highest possible level through improved management of resources.

4. The RAM consists of two related methodologies:

A. The Area Resource Allocation Methodology (ARAM) for use by Headquarters to allocate IHS resources to the 12 Area Offices. The Director, IHS will annually identify funds for distribution or redistribution by ARAM.

B. The Service Unit Resource Allocation Methodology (SURAM) for use by Area Offices to allocate their resources to IHS and tribally operated health programs within their respective Areas. Each Area Director will annually identify funds for distribution or redistribution by SURAM.

5. The IHS began its use of the RAM in allocating the FY 1987 Annual and Supplemental Appropriations. In estimating the funding level of P.L. 93-638 contracts for FY 1988, the IHS will continue to work to refine the RAM as we learn from our experience with its application. In fact, five workgroups of IHS and tribal officials are currently involved in such efforts as a followup to the Tulsa II workshop.

ADMINISTRATION OF P.L. 93-638

The IHS is continuing its efforts to improve the P.L. 93-638 contracting process and to respond to what tribal officials have viewed as administrative restrictions and complex reporting requirements. As a major initial component of our self-determination initiative, we are working with other Departmental staff to identify all ingredients to self-determination and develop remedies. The Director of IHS and the Director of the Division of Grants and Procurement Management, Health Resources and Services Administration (HRSA) jointly issued on April 1, 1986, a memorandum to the IHS Area Directors describing proposed changes to "streamline" the P.L. 93-638 contracting process. This memorandum was shared with tribal officials and tribal P.L. 93-638 contractors for review and comment.

There has been further discussion among tribal, IHS, and HRSA officials of the proposed changes to improve the P.L. 93-638 contracting process and to revise the Sample Contract as a result of the IHS/tribal national workshop in Tulsa during October 1986. After considering the results of this intensive and continuing consultative process, the IHS issued, on March 6, 1987, Indian Self-Determination Memorandum (ISDM) 87-1 "Improvements in the P.L. 93-638 Contracting Process and Revision of the P.L. 93-638 Sample Contract Issued with ISDM 85-1"

The purpose of ISDM 87-1 is to describe the status of "simplification" of the P.L. 93-638 contracting process, and to revise the Sample P.L. 93-638 Cost Reimbursement Contract to further simplify P.L. 93-638 contract requirements.

Later, in March 1987, the IHS held the third national IHS/tribal workshop already described (Tulsa II). A major topic at the workshop was discussion and orientation to ISDM 87-1 which was followed by a workshop session in which IHS and tribal participants identified at least 36 additional recommendations and suggestions for further simplification of the P.L. 93-638 contracting process. A workgroup of IHS and tribal officials is currently working on these recommendations and suggestions and will, as will the other four Tulsa II workgroups, provide me a final report of their conclusions and recommendations.

Based on recommendations made at the Tulsa II Workshop for development and communication of materials well in advance of these national workshops, our next national workshop is being planned during the Spring of 1988. This will provide sufficient time for IHS/tribal officials to work together in Area Workshops during the Winter of 1987-1988.

Another group of IHS and tribal officials is developing criteria for selecting among the three award instruments authorized in P.L. 93-638: contracts, grants, and cooperative agreements. A final report with recommendations will be submitted to me. The results will also be discussed at the next IHS/tribal national workshop.

The IHS and tribes have shown, especially over the past two years through these various Area meetings, national workshops, and day-to-day and other communications, that the tribal consultation process is both important to communication and understanding and essential to the effective conduct of a nationwide Indian health program respecting the principals of tribal sovereignty and the government-to-government relationship. Therefore, the IHS is working with tribal officials to develop an IHS policy on tribal consultation and will consider the information and concepts included in a recent policy paper on this subject developed by the National Indian Health Board.

The IHS is also studying the recommendations of the recent studies/reports on Indian Self-Determination activities developed by the National Indian Health Board, General Accounting Office, Office of Technology Assessment, and Public Health Service, as well as our own Descriptive Analysis of Tribal Health Page 10.
Programs in our continuing effort to establish a more positive environment for Indian Self-Determination in the IHS and to help Indian tribes succeed in their self-determination activities.

S. 1703

I would now like to turn to the specifics of S. 1703. The bill contains a number of provisions that are unclear but appear to be derived from [illegible] with [illegible] provisions. [illegible] in the terms of the bill, these [illegible] would apply equally to IHS. Though I will mention at least one of these in what follows, they will be dealt with in a more detailed analysis of the bill which is underway. I would now like to discuss a number of major issues with S. 1703.

We applaud the goal to simplify and strengthen the self-determination process. As I have just mentioned, we have already undertaken numerous efforts to administratively do just that, consistent with our initiative for hospital and clinic operations. However, S. 1703 contains provisions that would hamper our efforts to equitably allocate resources, restrict IHS' management flexibility and provide unworkable and potentially harmful solutions to problems for which solutions have already been developed. For these reasons, we do not support the bill as currently drafted.

The first major issue concerns the various provisions which, when taken together, determine the level at which contracts must be funded. Section 4 of S. 1703 adds a definition of "Contract Costs" which includes all direct and indirect costs "which are necessary and reasonable". Moreover, tribes and tribal organizations are (under proposed sec. 102(a)(3)) "entitled to contract" for an amount which "shall include all contract costs incurred." (proposed sec. 106(a)(1)) but "not less than . . . otherwise provided for direct operation of the programs. . ." (Proposed sec 106(a)(4)). It is possible that these costs would be more than the IHS would have available for the program's direct operation.

Since the contractor is "entitled" to these costs, the IHS would be required to obtain the funds from elsewhere in the IHS system. The problem is compounded in that proposed sections 106(a)(2), (3), (5), (6) and (7) further "protects" tribal contractors' first year base funding (direct and indirect) from reduction in future years from anything other than a reduction in subsequent appropriations. This creates a "first come first served" system with the risk of fund reductions being borne by those tribes which have chosen not to contract.

These interrelated provisions, combined with the definitions proposed in section 4, appear to provide tribal contractors with an entitlement to all costs reflected in the contract, direct as well as indirect, and established as a funding base for future years whatever can be justified as "necessary and reasonable" in the first year without regard to what funds IHS would have spent on the program, changes in program needs, or efforts to equitably distribute IHS resources. Moreover, permitting the base funding of a contract to be reduced only when there is a reduction in the appropriation would preclude the use of the Resource Allocation Methodology (RAM) when appropriations are constant from one year to the next.

We would support changes in the bill that would allow a small reduction in contract funding to reflect reductions in program needs, or efforts to achieve equity among IHS service units. Such a change would allow IHS to pursue equitable distribution of funding while providing relative stability for contract funding. We would be willing to work with the Committee in devising language to that end.

As explained above, our allocation system takes into account Tribal Health Program Management costs in allocating funds on a reasonable, rational, and equitable basis between all IHS operated and contracted programs. The purpose of our allocation system is to fund such costs based upon comparable standards of need. We have been directed to do this by both the courts and the Congress including this Committee's own bill to extend the Indian Health Care Improvement Act (see section 201(i) of S. 129).

In the case of relatively constant appropriations, S. 1703 provisions would injure those tribes that choose not to contract by reducing the funds available for IHS direct services while 638 contracts are funded at the same level.

The court, in Rincon Band of Mission Indians v. Harris, 618 F.2d 569 (1980), ordered the IHS to develop a system to rationally allocate its funds, noting that:

> "A system that allocates funds to programs merely because the programs received funds the previous year, regardless of whether the programs are ineffective, unnecessary or obsolete is not rationally aimed at an equitable division of funds."

We are opposed to Section 205 of the bill which would institutionalize precisely the problem cited by the Rincon court by making the previous years' base funding automatically available for tribal contractors under P.L. 93-638, while placing at risk those tribes exercising their self-determination option to receive health services delivered by the IHS.

During a period of relatively constant annual appropriations, the overall effect of this bill would be to negate the RAM and prevent IHS from going forward with current attempts, with tribal consultation, to allocate resources on an equitable basis.

Another issue is the extension of Federal Tort Claims Act coverage. The Department opposes that part of Section 201 which would extend Federal Tort Claims Act coverage to P.L. 93-638 tribal contractors, Buy Indian contractors, and urban Indian organizations. This provision would have wide-ranging adverse ramifications as a precedent for other government contractors. Nevertheless, we are aware of and are equally concerned about the crisis in rising costs of medical malpractice insurance, a problem which is by no means unique to Indian contractors. In order to address this problem, this Department will seek additional funds in the development of next years' budget to specifically address tribal malpractice costs.

Section 201 also directs the Secretary to enter into contracts with tribes or tribal organizations. It is not clear what is intended by this language change. On its face it appears to open up a whole new category of self-determination contractors who are not tribes and who will not be required to get the approval of tribes.

Proposed section 106(g) which directs that the combined contract amount be carried in the contracting agency's budget at the specific budget location of the contracted program, appears directed at the Department of the Interior (DOI) budget procedures. The Department of Health and Human Services does not budget in the manner described. However, the provision would apply to both Departments.

We are also opposed to the provision in Sec. 205 forgiving indebtedness of tribes who have failed to properly account for their funds. This is unfair to those tribes who have done their accounting and invoicing correctly and have incurred no such debts. It is also a disincentive for tribes to properly manage their programs. Existing cost principles are fair and adequate.

Mr. Chairman, that concludes my opening remarks. At this time I will be happy to answer any questions the Committee may have.

PRESIDENT'S COUNCIL
ON INTEGRITY AND
EFFICIENCY

AUDIT OF METHODS OF REIMBURSING INDIAN ORGANIZATIONS FOR INDIRECT COSTS INCURRED

SEPTEMBER 1987

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
WASHINGTON, D.C. 20240

October 1, 1987

Honorable Daniel K. Inouye
Chairman, Select Committee on Indian Affairs
Washington, D.C. 20510-6450

Dear Mr. Chairman:

Enclosed per your October 1, 1987, request is a copy of the audit report entitled "Audit of Methods of Reimbursing Indian Organizations for Indirect Costs Incurred." The audit was initiated by the President's Council on Integrity and Efficiency and was made by the Offices of Inspector General of the Department of the Interior, the Department of Health and Human Services, and the Department of Education. We were the lead organization for this audit.

We concluded that Federal agencies did not reimburse Indian organizations a projected total of about $14 million of the $88.4 million in indirect costs applicable to fiscal year 1985 Federal contracts and grants. We recommended that the Assistant Secretary for Indian Affairs submit proposals to Congress and the Office of Management and Budget to change the method of reimbursing Indian organizations for indirect costs.

If your Committee has any questions concerning the report, please contact Ms. Joyce Fleischman, Deputy Inspector General, on 343-5745.

Joyce Fleischman
James R. Richards
Inspector General

PRESIDENT'S COUNCIL on INTEGRITY & EFFICIENCY

September 30, 1987

Memorandum

To: Assistant Secretary for Indian Affairs, Department of the Interior

From: Assistant Inspector General for Audits, Office of
Inspector General, Department of the Interior

Subject: Audit Report, "Audit of Methods of Reimbursing Indian
Organizations for Indirect Costs Incurred"

This report contains the results of a review initiated by the President's Council on Integrity and Efficiency to determine the most appropriate method of reimbursing Indian organizations for indirect costs incurred relative to Federal contracts and grants. The review was made by the Offices of Inspector General of the Department of the Interior, the Department of Health and Human Services, and the Department of Education.

We concluded that Federal agencies did not reimburse Indian organizations a projected total of about $14 million of the $88.4 million in indirect costs applicable to fiscal year 1985 Federal contracts and grants. This shortfall, which caused hardships on some Indian organizations, occurred because of legislative or administrative restrictions over the amount of indirect costs that some Federal agencies were allowed to reimburse and because program funds were insufficient to reimburse the Indian organizations for all eligible indirect costs.

We recommended that the Assistant Secretary for Indian Affairs submit proposals to Congress and the Office of Management and Budget to change the method of reimbursing Indian organizations for indirect costs by (1) removing the legislative and administrative restrictions that affect the reimbursement of indirect costs of Indian organizations, (2) authorizing the Bureau of Indian Affairs to negotiate lump-sum agreements to directly fund all indirect costs relative to Federal contracts and grants, (3) budgeting and providing full funding to the Bureau of Indian Affairs for indirect cost lump-sum agreements, and (4) authorizing Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in the subsequent year. We also recommended that the Assistant Secretary for Indian Affairs not proceed with the Bureau of Indian Affairs efforts to establish a flat-rate reimbursement procedure for indirect costs.

The Assistant Secretary for Indian Affairs July 16, 1987, response to the draft report (Appendix 4) disagreed with the first recommendation and did not address the second recommendation. We request that the Assistant Secretary reconsider his position on the first recommendation in light of our additional comments and that he provide a response to the second recommendation. Appendix 5 identifies the information needed to resolve the two recommendations and remove them from our followup system.

In accordance with the Departmental Manual (360 DM 5.3), we are requesting your written response to this report by December 11, 1987. The legislation creating the Office of Inspector General requires semiannual reporting to Congress on all reports issued, actions taken to implement recommendations, and identification of each significant recommendation on which corrective action has not been implemented.

Harold Bloom
Harold Bloom

cc: Audit Liaison Officer - Indian Affairs
Audit Liaison Officer - Bureau of Indian Affairs

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INTRODUCTION

The Department of the Interior's Office of Inspector General has been negotiating indirect cost rates with Indian organizations since 1976. Through the negotiation process, it has become apparent that Federal agencies have not reimbursed Indian organizations all indirect costs incurred on Federal contracts and grants awarded to these organizations. These underreimbursements have caused financial hardships to Indian organizations. In July 1983, this problem with indirect cost reimbursements was discussed with the Office of Management and Budget and several Federal agencies, and the participants agreed that corrective actions by program personnel were needed. This audit was undertaken because the problem still existed in July 1986.

BACKGROUND

For fiscal year 1985, 242 Indian organizations (tribes, nonprofit organizations, schools, and colleges) reported costs of about $717 million for operating Federal, state, tribal, and other programs. This amount included direct costs totaling about $591 million and indirect costs totaling about $126 million. Of the $126 million of indirect costs, about $88.4 million was attributable to Federal contracts and grants awarded to all Indian organizations except the Navajo Nation, which was excluded from the scope of our audit. About $449 million of the $717 million was funded with contracts and grants issued by the Department of the Interior's Bureau of Indian Affairs (about $287 million) and the Department of Health and Human Services Indian Health Service (about $162 million) under Public Law 93-638, the Indian Self-Determination and Education Assistance Act.

According to Office of Management and Budget Circular No. A-87, "Cost Principles for State and Local Governments," the total cost of a contract or grant program is composed of the allowable direct costs, plus the allocable portion of allowable indirect costs, less applicable credits. Indirect costs are those costs incurred for a common or joint purpose, benefiting more than one cost objective, and not readily assignable to the cost objectives specifically benefited. An indirect cost rate is the ratio of all allowable indirect costs to an allocation base (usually either total direct salaries and wages or total direct costs).

OBJECTIVE AND SCOPE

The objective of this audit was to determine the most appropriate method of reimbursing indirect costs incurred by Indian organizations relative to Federal contracts and grants. Specifically, we (1) determined the impact that legislative and administrative limitations and funding shortages have on indirect cost reimbursements, (2) evaluated the effects the different types of indirect cost agreements have on Indian organizations and Federal agencies, (3) evaluated the appropriateness of the criteria for negotiating indirect cost rates, and (4) reviewed an alternate method of reimbursement proposed by the Bureau of Indian Affairs.

Statistical sampling was used to determine the impact that legislative and administrative limitations and funding shortages have on indirect cost reimbursements. Our statistical sample included a review of 38 Indian organizat[illegible] determine if shortfalls existed in reimbursements for fiscal y[illegible] indirect costs under Federal contracts and grants and the extent of [illegible] shortfalls. The results obtained in the sample were used to project t[illegible]rtfalls in indirect cost reimbursements to the 241 Indian organizati[illegible] that have indirect cost rate agreements. We excluded the Navajo Nation from the universe in selecting our sample because its fiscal year 1985 accounting records had not been closed at the time of our audit and an indirect cost agreement had not been completed for the period audited. Also, the Navajo Nation's direct and indirect cost funding was about $104 million (15 percent) of the total funding of $717 million for all 242 Indian organizations, and inclusion of the Navajo Nation would have distorted the results of our review.

The audit was a joint effort of the Inspectors General from the Department of the Interior, the Department of Education, and the Department of Health and Human Services and was performed from November 1986 through May 1987. Our review was made in accordance with the "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions," issued by the Comptroller General of the United States. Accordingly, our review included such tests of records and other auditing procedures as were considered necessary under the circumstances.

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RESULTS OF AUDIT

1. INDIRECT COST REIMBURSEMENTS AND TYPES OF INDIRECT COST AGREEMENTS

Indirect Cost Reimbursements

Federal agencies did not reimburse Indian organizations for all indirect costs that were specified in Office of Management and Budget Circular No. A-87 as being allowable and allocable to Federal contracts and grants. Indirect costs were not fully reimbursed because legislative and administrative restrictions limited the percentages of indirect costs that could be reimbursed with program funds and because budget requests for indirect cost funding were insufficient. Based on our statistical sample, we projected that Federal agencies had not reimbursed Indian organizations about $14 million in allowable fiscal year 1985 indirect costs that were allocable to contracts and grants, compared to the $74.4 million of indirect costs that were reimbursed by Federal agencies. The shortfalls in indirect cost reimbursements caused financial hardships on some Indian organizations. The impact of these shortfalls on Indian organizations differed depending on the type of indirect cost agreement negotiated.

Federal agencies did not reimburse the 38 Indian organizations sampled a net of $3.15 million in indirect costs applicable to Federal contracts and grants as follows:

--Thirty-one Indian organizations were not reimbursed $3.17 million.

--Two Indian organizations were reimbursed all indirect costs.

--Five Indian organizations were overreimbursed a total of $22,000.

The shortfalls in indirect cost reimbursements are listed in Appendix 1 by Federal agency. The results obtained in the sample were projected to the 241 Indian organizations (excluding the Navajo Nation) that have approved indirect cost rates. We projected a $14 million shortfall in indirect cost reimbursements applicable to Federal contracts and grants.

When Federal programs do not reimburse their fair shares of indirect costs, Indian organizations must pay the differences because Federal regulations prohibit the shifting of such shortfalls to other programs. Shortfalls in indirect cost reimbursements cause hardships on some Indian organizations because, unlike state and local governments, most Indian organizations do not have discretionary revenues. Examples of hardships caused by shortfalls in indirect cost reimbursements follow:

--A contract school was not reimbursed $196,588 in indirect costs applicable to Federal contracts and grants. Because of this shortfall, the school neglected its property management and fiscal management systems and did not have the single audit performed that was required by Office of Management and Budget Circular No. A-102. This school's only sources of revenue were Federal contracts and grants.

--Another contract school was not reimbursed $162,858 in indirect costs applicable to Federal contracts and grants. This school went into debt because it was also totally dependent on Federal contracts and grants.

--A tribe was not reimbursed $72,977 in indirect costs applicable to Federal contracts and grants. The shortfall in indirect cost reimbursements was one of the reasons given for this tribe voluntarily returning its law enforcement program to the Bureau of Indian Affairs.

--Another tribe was not reimbursed $26,128 in indirect costs applicable to Federal contracts and grants. Because of the shortfall, this tribe reduced the working hours of all administrative personnel and did not have the required single audit performed.

Indirect costs were not fully reimbursed because legislative and administrative restrictions limited the percentages of indirect costs that programs were allowed to reimburse and because program funds were insufficient. Excess indirect cost reimbursements, which were relatively minor in amount, occurred because (1) Indian organizations applied indirect cost rates to ineligible direct costs and (2) Federal agencies did not recover the excess indirect cost reimbursements when the final indirect cost rates were less than the provisional rates.

Indirect Cost Reimbursement Limitations. During fiscal year 1985, legislative and administrative restrictions limited the amount of indirect costs reimbursed on at least 32 programs of four Federal departments which contracted with Indian organizations. These indirect cost funding limitations were legislatively (5 programs) or administratively (27 programs) imposed (Appendix 2). The amount of indirect costs allowed by these 32 programs ranged from 5 to 20 percent of the total contract amounts. The indirect cost rates of at least 66 of the 241 Indian organizations with approved rates exceeded the indirect cost percentages allowed by these 32 programs. For example, administrative cost reimbursements, which include indirect costs, for the Department of Labor's Job Training Partnership Act programs are limited to a percentage of the contract amount. Depending on which of the four programs is contracted, administrative cost limitations are 15 or 20 percent of the total contract amount. As a result of these limitations, $406,249 in indirect costs was not reimbursed to 16 of the 38 Indian organizations sampled.

Indirect Cost Funding Shortages. Although no regulations limit the amount of indirect costs the Bureau of Indian Affairs may reimburse, the Bureau did not allocate sufficient funds to reimburse indirect costs. In fiscal year 1985, the Bureau of Indian Affairs allocated about $37.7 million for indirect costs applicable to its Public Law 93-638 contracts, when the anticipated indirect costs were about $40.7 million. Consequently, indirect cost funding was short by at least $3 million. The deficit was probably greater than $3 million because the anticipated indirect costs did not consider any possible increases in indirect costs from fiscal year 1984 to fiscal year 1985. The shortage of indirect cost funds occurred because the budget request that was submitted by the Bureau of Indian Affairs to Congress did not include sufficient funds to cover the anticipated indirect costs.

Types of Indirect Cost Agreements

"A Guide for State and Local Government Agencies" (OASC-10), prepared by the former Department of Health, Education, and Welfare, contains the criteria for negotiating indirect cost agreements with Indian organizations. According to OASC-10, Federal agencies may negotiate indirect cost rates using three types of agreements: provisional-final, predetermined, and fixed with carry-forward adjustment. Office of Management and Budget Circular No. A-87 allows for lump-sum agreements, which are not addressed in OASC-10.

Uncertainties in the budget process and future expenditure levels significantly affect indirect cost reimbursements under all types of agreements except lump-sum. Indirect cost rates are often approved before the beginning of the fiscal year based on estimates of Federal program funding levels and related indirect costs. Indian organizations do not know what their actual Federal funding will be until after appropriations are passed several months into the fiscal year. Major differences between estimated and actual program funding cause overrecoveries and underrecoveries of indirect costs.

Other disadvantages of the different types of agreements are addressed in the following paragraphs.

Provisional-Final Agreements. A provisional agreement is negotiated prior to the fiscal year to which it applies. Since Indian organizations' actual costs are not known until the end of the fiscal year, provisional indirect cost rate agreements may be based on (1) a prior year's actual costs, (2) projected costs for the fiscal year under consideration, or (3) a combination of a prior year's actual costs and projected costs. At the end of the fiscal year, the Indian organization negotiates another agreement with the cognizant Federal agency, called a final agreement, which is based on actual costs. Using the final agreement, the Indian organization may retroactively revise the claims it made against Federal contracts and grants. Provisional-final agreements have two major disadvantages:

--They require additional administrative effort for Indian organizations and Federal agencies in negotiating two agreements for the same period and in revising claims.

--They may result in Indian organizations not recovering all of their indirect costs if the final rate is greater than the provisional rate and Federal funds are not available to cover the increase. Conversely, if final rates are less than the provisional rates, repayments are due the Government.

Predetermined Agreements. A predetermined agreement is based on an estimate of a future period's costs and is not subject to revision. A predetermined agreement will be used only when the cognizant Federal agency can assure itself that the rate agreed on will not result in a claim to the Government in excess of actual costs incurred by the Indian organization. This type of agreement usually results in indirect costs not being fully reimbursed because the actual indirect cost rate (based on costs incurred) usually exceeds the predetermined rate. Because of the potential overrecovery or underrecovery of indirect costs, the predetermined rate is used sparingly.

Fixed With Carry-Forward Agreements. Like the predetermined agreement, the fixed with carry-forward agreement is based on an estimate of a future period's costs and is not subject to revision. However, the differences between estimated and actual costs, when they become known, are included (carried forward) as adjustments in subsequent indirect cost rate agreements. According to OASC-10, the fixed with carry-forward agreement is the most desirable of the three types of agreements. This type of indirect cost agreement is the most commonly used in negotiating indirect cost rates with Indian organizations.

The fixed with carry-forward agreement often imposes the most severe financial hardship on Indian organizations because OASC-10 requires that the carry-forward adjustment be based on theoretical recovery. The problem is the carry-forward adjustment is calculated using the amount of indirect costs that should have been reimbursed (theoretical recovery) rather than the amount of indirect costs that were actually reimbursed. When Federal agencies do not reimburse the full amount of indirect costs authorized by the approved rates, Indian organizations have to repay, through a carry-forward adjustment, indirect costs they never received.

For example, one Indian organization in our sample should have collected $888,675 (theoretical recovery) in indirect costs applicable to fiscal year 1985 Federal contracts and grants, based on the indirect cost rate negotiated. However, due to indirect cost funding shortages and reimbursement limitations, this organization was actually reimbursed only $669,763 of the $698,474 in indirect costs it incurred. For that year, the Indian organization underrecovered $28,711 ($698,474 - $669,763). In calculating the indirect cost rate for fiscal year 1987, the organization's proposed indirect costs were reduced by the theoretical overrecovery of $190,201 ($888,675 - $698,474). The use of the fixed with carry-forward agreement resulted in an actual loss of $218,912 (the $28,711 underrecovery plus the $190,201 theoretical overrecovery) to this organization.

Of the 38 organizations in our sample, 27 had fixed with carry-forward rates. Of these 27 organizations, 16 were held responsible for $1.4 million in overrecovery carry-forward adjustments, even though they never received $1.3 million of this money.

Lump-Sum Agreements. Although lump-sum (negotiated fixed amount) agreements are not addressed in OASC-10, they are an allowable type of indirect cost reimbursement according to Office of Management and Budget Circular No. A-87. Lump-sum agreements specify the amounts of indirect cost reimbursements that Federal agencies agree to fund directly for all Federal contracts and grants awarded to a particular Indian organization. When this type of agreement is used, the Indian organization knows ahead of time the total indirect cost reimbursement that can be expected and can therefore systematically budget for indirect costs.

The Bureau of Indian Affairs has been negotiating lump-sum indirect cost agreements with Indian contract schools. The lump-sum amounts allow the schools to budget for indirect costs without being concerned with the fluctuations between estimated and actual Federal funding levels.

In fiscal year 1985, the Bureau of Indian Affairs negotiated lump-sum agreements with 17 contract schools. Three contract schools with lump-sum agreements were included in our sample. Only one of the three incurred more indirect costs than the agreed-upon reimbursement. This school overexpended its $80,600 lump-sum amount by only $1,747.

Provisional-final, predetermined, and fixed with carry-forward agreements can cause financial hardships on Indian organizations when indirect costs are not fully reimbursed. However, lump-sum agreements provide a fixed amount for indirect costs that allow Indian organizations to systematically budget for these costs and avoid theoretical recovery problems.

RECOMMENDATION

We recommend that the Assistant Secretary for Indian Affairs submit proposals to the Congress and the Office of Management and Budget to change the method of reimbursing Indian organizations for indirect costs associated with Federal contracts and grants by:

1.1. Removing legislative and administrative restrictions that limit the reimbursement of indirect costs to Indian organizations.

1.2. Authorizing the Bureau of Indian Affairs to negotiate lump-sum agreements to directly fund all indirect costs relative to Federal contracts and grants.

1.3. Budgeting and providing full funding to the Bureau of Indian Affairs for indirect cost lump-sum agreements.

1.4. Authorizing Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in the subsequent year.

Bureau of Indian Affairs Response to Recommendation

The Assistant Secretary for Indian Affairs disagreed with our overall recommendation but partially agreed with segment 1.1. The Assistant Secretary provided the following responses to the recommendation segments.

1.1. The Bureau agrees with the recommended removal of legislative and administrative restrictions that affect the reimbursement of indirect costs of Indian organizations. However, the Bureau disagrees with its assuming total responsibility for marshalling this effort. Because of the jurisdictional problems associated with any proposed legislation that would affect numerous Federal departments, the Bureau stated that it would be preferable for the Office of Management and Budget to instruct all agencies to include bill language with their annual appropriations requests which would allow full funding of indirect costs for Indian organizations.

1.2. The Bureau does not want to use lump-sum agreements to directly fund all indirect costs relative to Federal contracts and grants. The

Bureau's view is that changing to the recommended lump-sum payment system would not be possible for a number of reasons. A primary deterrent to the adoption of this segment of the recommendation is the present lack of adequate staff and the lack of potential for ever getting adequate staff to satisfactorily implement this system. Also, the Bureau contends that draft amendments to Public Law 93-638, now being actively considered in Congress, would effectively preclude the implementation of this recommendation segment.

The Bureau believes that the fixed with carry-forward process currently being utilized by the Office of Inspector General should be continued. However, it is the Bureau's recommendation that this process be revised by the Office of Inspector General to eliminate those steps in the process which create theoretical overrecovery/underrecovery problems.

1.3. The Bureau disagrees with requesting full funding for indirect cost lump-sum agreements. As mentioned earlier, the Bureau contends that Congress is actively considering amendments which will preclude implementation of the lump-sum agreement arrangement. The Bureau also stated that it is a fact that tribes have not in the past nor do they now receive under the present arrangement enough indirect cost dollars to operate. This is due to the fact that under the present system of operations, the Bureau is unable to reach certainty relative to indirect cost needs prior to the contracting year or prior to submittal of the annual budget to the Office of Management and Budget and consideration of the budget by the Congress. So, it is not a matter of the Bureau not requesting sufficient funding to cover indirect costs but one of not being able to do so due to the system under which it is compelled to operate, particularly with the problem of real and theoretical overrecovery/underrecovery that increases the uncertainty.

1.4. The Bureau disagrees with allowing Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in subsequent years because the Bureau does not believe the lump-sum approach is appropriate.

Office of Inspector General Comments

We recommend the Assistant Secretary for Indian Affairs reconsider the response to our recommendation. Our comments on the Bureau's response to the four recommendation segments follow:

1.1. The approval and support of the Office of Management and Budget are vital to the successful implementation of the recommendation. However, it is a Bureau function (130 Departmental Manual 1.3A) to coordinate the activities, programs, and functions provided by other Federal agencies and the private sector for the benefit of Indian people and organizations. Accordingly, the Bureau, as an advocate for Indian organizations, should take the lead role in developing a sound proposal that can be successfully presented to the Office of Management and Budget and Congress. The Office of Inspector General is willing to discuss its recommendation with Bureau officials and to support the Bureau's efforts in obtaining concurrence and approval from the Office of Management and Budget and Congress.

1.2. The Office of Inspector General plans to have the same involvement with lump-sum agreement negotiations as it now has with indirect cost rate negotiations. The Bureau would only have to incorporate lump-sum agreement negotiation documentation, prepared by the Office of Inspector General, into standardized contracts. We estimate that the Bureau would be responsible for about 225 additional contracts if lump-sum agreements were negotiated with each Indian organization that had an indirect cost rate. Additional staff should not be required if the administration of the lump-sum agreements is delegated to agency officials.

The draft amendments to Public Law 93-638, currently being considered by Congress, advocate budgeting and providing full funding for indirect costs. The draft amendments, in making reference to lump-sum agreements, did not cite objections to this method. We believe that the lump-sum agreement would be the best mechanism for implementing the intent of the draft amendments related to indirect costs. Lump-sum agreements would provide stable indirect cost budgets that would not be affected by fluctuations in direct program funding.

The Bureau's proposed alternative solution of substituting the theoretical recovery with the actual recovery violates OASC-10, which requires that the carry-forward adjustment be based on the amount of indirect costs that should have been recovered (theoretical recovery). This substitution would result in shifting the underrecovery of indirect costs to other Federal contracts and grants, which is prohibited by Office of Management and Budget Circular No. A-87, Attachment A, F.3.b.

Even though the Bureau's top management disagrees with using lump-sum agreements, the Bureau currently negotiates lump-sum agreements with 17 contract schools. Also, the Bureau's Contract Support Funds Working Group, in a June 8, 1987, memorandum, recommended that the Bureau adopt the lump-sum agreement approach.

1.3. The draft amendments do not preclude the use of lump-sum agreements and in fact advocate full funding. The draft regulations provide, "In addition to the amounts provided for direct program costs, an amount equal to the amount of direct program funds multiplied by the tribe's negotiated indirect cost rate shall be added to the tribe's contract funding."

The Bureau contends that it is not a matter of requesting sufficient funds but one of not being able to do so under the system which it must operate. We believe, however, that the Bureau has not sufficiently budgeted for indirect costs in the past. Bureau testimony provided in the fiscal year 1985 Senate appropriations hearings indicated that the Bureau did not know what the indirect cost need requirements were when its budget was submitted to Congress. However, the Bureau had access to historical indirect cost information but did not use it in formulating the fiscal year 1985 budget. Also, the Office of Inspector General has historical indirect cost information (including overrecovery/underrecovery) for each Indian organization with which it negotiates indirect cost rates. This information could be made available if requested by the Bureau.

In a July 29, 1987, meeting to discuss the findings and recommendations contained in the draft report, Bureau officials expressed additional reservations about implementing our recommendation on lump-sum agreements. Their reservations were based on perceived difficulties in obtaining the necessary data for budget formulation, as well as obtaining budget authority and the Congressional approval necessary to comply with the recommendation. Specifically, Bureau officials believed that budget formulation would be more difficult because the Bureau would have to obtain data on the level of direct program funding being requested by non-Interior agencies in order to request full indirect cost funding for that year. These officials also expressed concerns that non-Interior Congressional appropriations subcommittees would not be willing to relinquish to the Department of the Interior's appropriations subcommittees control over significant portions (indirect costs) of total funding for their programs. Such an arrangement would be necessary under the lump-sum reimbursement method.

While we acknowledge the Bureau's concerns regarding budget formulation, authority, and approval, we do not believe these obstacles would preclude the Bureau from implementing our recommendations. Although the purpose of our audit was not to address the Bureau's budget process, we offer the following comments on the Bureau's concerns.

In addition to providing Indian organizations with stable funding levels, the lump-sum method should also simplify budget formulation. It will provide the Bureau with sound cost data on which future budgets can be based and will eliminate the problems of dealing with theoretical underrecoveries and overrecoveries in formulating budget estimates. The effort of maintaining and evaluating the historical cost data and proposed increases in costs will primarily remain with the Office of Inspector General through the indirect cost evaluation and negotiation process. The Bureau's effort would include identifying major changes in indirect cost needs of Indian organizations and consolidating this information, in developing budget estimates, with that obtained by the Office of Inspector General.

Also, it is easier to project total indirect cost needs for all Federal contracts and grants administered by Indian organizations than to project indirect costs of individual programs. An analysis of direct program costs for 81 Indian organizations showed that total direct program costs increased by only 2.4 percent over a 5-year period, even though the direct program components changed significantly. Consequently, Indian organizations' overall needs for indirect costs would be expected to remain somewhat constant, thereby simplifying budget formulation. A one-time effort to establish a system for accumulating annual budget data from non-Interior agencies for funding Indian programs would not be a time-consuming or expensive task.

The relationship between the Federal Government and state and local governments and Indian organizations for the administration of Federal programs is based on the premise that the Federal Government will bear its fair share of the cost of administering these programs. Office of Management and Budget Circular No. A-87 establishes this premise as Federal Government policy and prescribes procedures to be followed so that indirect costs can be appropriately distributed to all contributing Federal programs. While state and local governments can compensate for shortfalls in indirect cost funding with discretionary revenues received from taxation and other means, most Indian organizations cannot compensate because they do not have discretionary revenues. Hence, our recommendation for a lump-sum agreement approach was made to ensure that Indian organizations receive full funding of costs associated with the administration of Federal programs.

The Bureau's concern that appropriations subcommittees will be reluctant to relinquish control over indirect cost funding is understandable but can be overcome through effective coordination. The Bureau would need to coordinate agreements with the key Congressional appropriations subcommittees, as well as the Office of Management and Budget and other Federal departments and agencies, that total funding requirements for indirect costs on Indian contracts and grants will be included only in the Bureau of Indian Affairs budget with offsetting decreases in the budgets of other Federal organizations. Both the Bureau and the other Federal agencies involved could justify this funding arrangement in their budget requests by citing the advantages of the lump-sum approach; specifically, the simplification of the budget process and the elimination of the hardships to Indian organizations caused by the lack of full funding for indirect costs and the fluctuation in indirect cost funding resulting from the carry-forward adjustments.

1.4. This recommendation segment conforms with the Code of Federal Regulations (25 CFR 271.55), which allows contract savings (except social services grant funds) to be carried over into succeeding fiscal year contracts.

Bureau of Indian Affairs Response to Other Issues

In addition to responding to the audit recommendation, the Bureau responded to other issues related to this audit finding. The Bureau's response and the Office of Inspector General's comments on the Bureau's response follow:

1. Bureau policy and practice, as established in numerous memoranda, provide for reimbursement of contractors' indirect costs at 100 percent of their approved rates. Since contractors have the opportunity to meet 100 percent of their indirect cost rates from the funding provided under the total contract amounts, any shortfalls from indirect costs would have to be self-imposed.

2. The Bureau identified several issues which should be addressed and requests the opportunity to work with the audit staff to reach agreement on (1) revising the 50 percent tribal government entitlement to be paid as indirect costs and (2) allowing for greater Bureau involvement in the rate negotiation process.

Office of Inspector General Comments on the Bureau Response to Other Issues

1. Even though it may be the Bureau's policy to reimburse 100 percent of the indirect costs related to approved rates, the Bureau has not allocated sufficient funds to its area offices to provide Indian organizations with 100 percent of the indirect costs allocable to Public Law 93-638 contracts and grants. A June 8, 1987, memorandum prepared by the Bureau's Contract Support Funds Working Group specified that the Bureau

sought on[illegible]erage of 92 percent of indirect cost needs related to its Public L[illegible]38 contracts and grants. The underfunding of fiscal year 1985 indi[illegible] costs identified in this report confirms the problem of not fully rei[illegible]ing indirect costs. Since total contract funding was less than the total direct and indirect cost needs of Indian organizations, the shortfalls of indirect cost reimbursements were not self-imposed.

2. The Office of Inspector General allows 50 percent of tribal government costs as indirect costs, which is permissible according to OASC-10 and Office of Management and Budget Circular No. A-87. This allowance is based on an analysis by the Office of Inspector General of the average percentage of time tribal council members spent administering Federal contracts and grants. If the Bureau believes that the 50 percent allowance is not currently representative of the average tribal council involvement, we will consider any Bureau-provided analytical data when negotiating future indirect costs.

We welcome the Bureau's participation in the indirect cost negotiation process. The Bureau's involvement could be valuable in determining the reasonableness of the individual indirect cost components, such as fringe benefit, legal, insurance, and tribal government costs proposed by Indian organizations.

2. ALTERNATE METHOD OF FUNDING INDIRECT COSTS

The Bureau of Indian Affairs is proposing to use a standard flat rate instead of negotiated indirect cost rates as the method of reimbursing indirect costs applicable to Bureau programs. The reason given for changing the indirect cost reimbursement methods is to resolve the theoretical recovery problem. This flat-rate method will not resolve the theoretical recovery problem, and depending on the flat rate that is authorized, this method may result in indirect cost reimbursement shortages greater than those experienced in fiscal year 1985 under existing methods or may result in reimbursements that are greater than costs incurred.

The Bureau of Indian Affairs originally was considering a 15 percent flat rate for indirect cost reimbursements, but the Bureau is currently noncommittal on the specific amount of the flat rate and has not finalized its proposed regulations. Draft regulations specify that the flat rate is not to be applied to certain program costs. According to the draft regulations, any surpluses resulting from the flat rate may be used to supplement the same programs. Using the criteria in the draft regulations and fiscal year 1985 cost information, we analyzed the impact of different flat-rate percentages (ranging from 15 to 50 percent) on the 38 Indian organizations sampled (Appendix 3). Explanations of three comparisons follow:

--A 15 percent flat rate would reimburse only $4.9 million in indirect costs allocable to Bureau of Indian Affairs contracts and grants. This is a net of $4.4 million less than the $9.3 million authorized by the approved rates and a net of $3.3 million less than the amount actually reimbursed for the same programs in fiscal year 1985. Indirect cost reimbursements to 36 Indian organizations would be short by $4,445,371, and indirect cost reimbursements to one organization would include a surplus of $8,330.

--A 25 percent flat rate would reimburse only $8.1 million, which is a net of $1.2 million less than the $9.3 million authorized by the approved rates and a net of $77,447 less than the amount actually reimbursed for the same programs in fiscal year 1985. Indirect cost reimbursements to 19 organizations would be short by $1,868,382, and indirect cost reimbursements to 18 organizations would include surpluses totaling $666,316.

--A 35 percent flat rate would result in a net surplus totaling $2.0 million. Indirect cost reimbursements to 6 organizations would be short by $668,754, and indirect cost reimbursements to 31 organizations would include surpluses totaling $2,701,666.

Shortages and overages in indirect cost funding cannot be avoided if a flat rate is used because Indian organizations differ in the types and amounts of direct and indirect costs they incur and in the methods by which they account for costs. A cost that may be necessary and equitably and economically classified as a direct cost by one Indian organization may not be necessary or may be most equitably and economically classified as an indirect cost by another Indian organization. This is why OASC-10 and Office of Management and Budget Circular No. A-87 allow flexibility in classifying and allowing direct and indirect costs.

The proposed flat-rate method of funding indirect costs applies only to Bureau of Indian Affairs contracts and grants. This method will cause hardships on Indian organizations when they are not fully reimbursed for all allowable and allocable indirect costs incurred. Other Federal agencies will still be using the negotiated fixed with carry-forward rates, which are calculated using total program costs including those of the Bureau of Indian Affairs. Indian organizations will still be responsible for overrecovery carry-forward adjustments, even though the money was never received.

RECOMMENDATION

We recommend that the Assistant Secretary for Indian Affairs discontinue further efforts to establish a flat-rate reimbursement procedure for indirect costs of Indian organizations and instead proceed with the recommendation proposed in the first finding.

Bureau of Indian Affairs Response to Recommendation

The response to the draft report did not address this recommendation.

Office of Inspector General Comments

This recommendation is unresolved. We are requesting that the Assistant Secretary provide a response to this recommendation.

APPENDIX 1

INDIRECT COSTS
NOT REIMBURSED TO 38
INDIAN ORGANIZATIONS IN SAMPLE
BY FEDERAL AGENCY

AGENCY	AMOUNT
Department of Health and Human Services	$1,238,395
Department of the Interior--Bureau of Indian Affairs	1,124,617
Department of Labor	389,495
Department of Education	88,112
Department of Agriculture	71,101
Department of the Treasury	57,522
Department of Housing and Urban Development	52,511
Department of Commerce	38,915
Other Federal Agencies	87,383
Total	$3,148,051

APPENDIX 2

SUMMARY OF LEGISLATIVE AND ADMINISTRATIVE RESTRICTIONS THAT LIMITED INDIRECT COST REIMBURSEMENTS TO INDIAN ORGANIZATIONS

Federal Agency	Legislative Restrictions	Administrative Restrictions	Total Restrictions
Department of Education	0	19	19
Department of Health and Human Services	3	5	8
Department of Labor	1	3	4
Department of Housing and Urban Development	1	0	1
Total	5	27	32

The Bureau of Indian Affairs instituted a restriction in fiscal year 1986 that limits indirect cost reimbursements under the Housing Improvement Program.

ANALYSIS OF THE BUREAU OF INDIAN AFFAIRS

PROPOSED FLAT INDIRECT COST RATE USING FISCAL YEAR 1985 COST INFORMATION

Indian Organization Reference No.	Total Authorized Indirect Costs	Actual Indirect Costs Not Reimbursed	Indirect Costs Under/Over(-) Reimbursed Using Rates Rang[illegible] 15-50%							
			15% Rate	20% Rate	25% Rate	30% Rate	35% Rate	40% Rate	[illegible]	50% Rate
1-1	$188700	0	$82009	$46445	$10881	$-24683	$-60246	$-95810	$-131374	$-166938
1-2	6382	$285	1410	-247	-1904	-3561	-5218	-6876	-8533	-10190
1-4	17965	2827	6783	3056	-671	-4398	-8125	-11853	-15580	-19307
1-5	199504	66345	94753	59836	24919	-9999	-44916	-79833	-114750	-149667
1-8	2224	2224	424	-176	-776	-1376	-1976	-2576	-3176	-3776
2-1	2248	-13	706	191	-323	-837	-1351	-1865	-2379	-2894
2-3	63614	0	-8330	-32312	-56293	-80275	-104256	-128238	-152219	-176201
2-4	16997	-1800	5698	1932	-1835	-5601	-9367	-13133	-16900	-20666
2-5	20931	10077	8988	5007	1026	-2955	-6936	-10917	-14898	-18879
2-7	88200	1747	26661	6148	-14365	-34877	-55390	-75903	-96416	-116929
3-1	3028	122	1506	998	491	-17	-525	-1032	-1540	-2047
3-2	85884	190	22577	1475	-19627	-40730	-61832	-82934	-104036	-125139
3-3	106330	25	63818	49647	35477	21306	7135	-7036	-21206	-35377
3-4	38247	542	14831	7025	-781	-8586	-16392	-24197	-32003	-39808
3-5	43752	14	32199	28348	24498	20647	16796	12945	9094	5243
4-1	123619	-370	60762	39809	18857	-2096	-23048	-44001	-64953	-85906
4-3	410103	170203	265019	216658	168297	119936	71574	23213	-25148	-73510
4-4	160804	35115	45554	7137	-31280	-69696	-108113	-146530	-184946	-223363
4-5	192081	181	100111	69454	38797	8140	-22517	-53173	-83830	-114487
4-7	95948	11498	2489	-28664	-59817	-90970	-122123	-153276	-184429	-215582
5-1	447966	17	305442	257934	210426	162918	115410	67902	20394	-27114
5-2	465400	94222	185630	92373	-883	-94140	-187397	-280653	-373910	-467167
5-3	256360	35074	16962	-62838	-142638	-222437	-302237	-382036	-461836	-541635
5-4	799895	159557	353511	204716	55921	-92874	-241669	-390463	-539258	-688053
5-5	331063	-58518	82766	0	-82765	-165531	-248297	-331062	-413828	-496594
5-6	439234	-3938	309085	265701	222318	178935	135552	92169	48786	5403
6-1	495621	-108381	246147	162989	79831	-3328	-86486	-169644	-252802	-335960
6-2	180813	53264	91005	61069	31134	1198	-28738	-58674	-88610	-118546
6-3	249133	5253	53260	-12032	-77323	-142614	-207905	-273196	-338487	-403779
6-4	233307	7199	61929	4803	-52324	-109450	-166576	-223702	-280828	-337954
6-5	293150	82678	90692	23206	-44280	-111766	-179252	-246738	-314224	-381710
6-6	129540	6952	4757	-36837	-78431	-120025	-161619	-203214	-244808	-286402
6-7	590626	1103	326684	238703	150722	62741	-25240	-113220	-201201	-289182
6-8	399438	60787	221888	162705	103522	44338	-14845	-74028	-133212	-192395
6-9	505675	187712	236126	146276	56427	-33423	-123273	-213122	-302972	-392822
6-10	320887	30647	150878	94208	37539	-19131	-75801	-132471	-189140	-245810
7-1	1284829	271777	872311	734805	597299	459793	322287	184781	47275	-90232
7-2	0	0	0	0	0	0	0	0	0	0
Total	$9289498									
Net Under/(-)Over	Reimbursements	$1124617	$4437041	$2819548	$1202066	$-415424	$-2032912	$-3650396	$-5267883	$-6885375

APPENDIX 3

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 16 1987

Memorandum

To: Assistant Inspector General for Audits

From: Assistant Secretary - Indian Affairs

Subject: Draft Audit Report No. C-BIA-08-07, The Presidents's Council on Integrity and Efficiency's Audit of Methods of Reimbursing Indian Organizations for Indirect Cost Incurred.

We have analyzed the subject draft audit report and disagree with a number of its findings and recommendations. Prior to stating our specific objections to each recommendation we offer some comments for your consideration and further discussion between our offices.

There appears to be a lack of understanding of Bureau of Indian Affairs' policy and practice as expressed in this draft report. In the Executive Summary and on page 7, the report indicates that the Bureau did not provide sufficient funds for contractors to meet their individual indirect cost rates. Bureau policy and practice as established in numerous memoranda provide that contractors are reimbursed at 100 percent of their approved rates. Given this policy it is difficult to comprehend that the shortfalls attributed to the Bureau in this report are accurate. Since contractors have the opportunity to meet 100 percent of their indirect cost rates from the funding provided under the total contract amounts, any shortfalls for indirect costs, would have to be self-imposed. That is, the contractor would choose not to expend funding in accordance with its rate. Consequently, such shortages would not be the result of the Bureau's failure to provide adequate funds.

It is clear that the Office of the Inspector General (OIG) has audited an internal Bureau account entitled Contract Support Funds (CSF) and not the Bureau's policy and practice of providing full funding for indirect costs. While there have been shortfalls in the CSF account such shortages were certainly not premeditated but rather occur because certain conditions of P.L. 93-638 do not allow the Bureau to reach certainty, relative to need and subsequently to request sufficient funds. A major premise of the OIG recommendations is focused on the Bureau's inability to meet contractor indirect costs. Because the premise as presented in the report is incorrect, the conclusions and recommended corrective actions as pertain to the BIA are not appropriate.

We believe that the Fixed With Carry-Forward process currently being utilized by the OIG in awarding indirect cost rates should be continued. However, it is our recommendation that this process be revised by the OIG to eliminate those steps in the operation which create theoretical over/under recovery problems.

Additionally, we have identified several issues which should be addressed and request the opportunity to work with your staff to reach agreement on: 1) revising the 50 percent tribal government entitlement to be paid as indirect costs; and, 2) allowing for greater Bureau involvement in the rate negotiation process. Finally, we ask that a meeting be held between our respective offices prior to the finalization of this audit report.

This report recommends that the Assistant Secretary - Indian Affairs submit proposals to the Congress and the Office of Management and Budget to:

1. Remove legislative and administrative restrictions that affect the reimbursement of indirect costs of Indian organizations.

   We agree with this recommendation. However, we disagree with your recommendation that the BIA assume total responsibility for marshalling this effort. Because of jurisdictional problems associated with any proposed legislation that would affect numerous Federal departments, it would be preferable for the OMB to instruct all agencies to include bill language with their annual appropriations request which would allow full funding of indirect costs for tribal contractors.

2. Authorize the BIA to negotiate lump sum agreements to directly fund all indirect costs relative to Federal contracts and grants.

   We disagree with this recommendation. It is our view that changing to the recommended lump sum payment system would not be possible for a number of reasons. A primary deterrent to the adoption of this recommendation is the present lack of adequate staff and the lack of potential for ever getting adequate staff to satisfactorily implement this system. Also, we are aware that current proposed amendments to P.L. 93-638 now being actively considered in Congress would, if passed, effectively preclude the implementation of this recommendation.

3. Budget and provide full funding to the BIA for indirect cost lump sum agreements.

   We disagree with this recommendation. As mentioned earlier, we are aware that Congress is actively considering amendments which will preclude implementation of the lump sum agreement arrangement. It is a fact that tribes have not in the past nor do they now receive under the present arrangement enough additional indirect cost dollars with which to operate. This is due to the fact that under the present system of operations, the Bureau is unable to reach certainty relative to indirect cost needs prior to the contracting year or prior to submittal of the annual budget to OMB and its consideration by the Congress. So, it is not a matter of the Bureau not requesting additional funding to cover indirect costs but one of not being able to do so due to the system under which we are compelled to operate particularly with the problem of real and theoretical over/under recovery that increase the uncertainty.

4. Authorize Indian organizations to use any unexpended balance (savings) of lump-sum agreements for indirect or direct costs incurred in the subsequent year.
We disagree with this recommendation. Since we do not believe the lump sum approach is appropriate there would be no need to seek authorization to expend savings.

APPENDIX 5

ADDITIONAL RESPONSES NEEDED TO RESOLVE RECOMMENDATIONS

For each recommendation shown below, provide the information requested.

Finding/Recommendation Reference	Information Requested
1.1, 1.2, 1.3, and 1.4	Provide a specific target date for submitting proposals to Congress and the Office of Management and Budget for (1) removing legislative and administrative restrictions that limit the reimbursements of indirect costs, (2) authorizing the Bureau to negotiate lump-sum agreements to directly fund all indirect costs related to Federal contracts and grants, (3) budgeting and providing full funding for lump-sum agreements, and (4) authorizing savings under lump-sum agreements to be used for costs of the subsequent year.
2.1	Provide a response on discontinuing further efforts to establish a flat-rate reimbursement procedure for indirect costs.

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
WASHINGTON, D.C. 20240

July 15, 1983

Memorandum

To: Assistant Secretary—Indian Affairs
Assistant Secretary—Policy, Budget and Administration

From: Inspector General

Subject: "Trend Analysis Using Data Available From the Indirect Cost Rate Negotiation Process With Indian Tribes"

The above document is enclosed. It presents an analysis of direct program costs and related administrative costs for 81 tribes for a 5-year period. We have received several inquiries concerning this analysis, and we hope the information will be useful.

Since the document contains no recommendations, a response is not requested. The data was compiled by our Central Region and they will be glad to answer any questions relating to the analysis.

Richard Mulberry
Richard Mulberry

Enclosure

TREND ANALYSIS
USING DATA AVAILABLE FROM
THE INDIRECT COST RATE NEGOTIATION PROCESS
WITH INDIAN TRIBES

BACKGROUND

The Office of Inspector General and it predecessor organization have negotiated indirect cost rates with Indian Tribes, Tribal Organizations, and BIA contract schools since 1977. This negotiation process has produced a considerable amount of historical data covering the size and composition of both the programs managed by Indian Tribes and the administrative costs incurred in the handling of these programs. Because of the current interest in Indian Programs and related administrative costs, we decided that a historical analysis would be timely. This document presents the results of that analysis and the inferences or conclusion that can be drawn from the data. This document contains no recommendations.

SCOPE

We negotiated about 150 indirect cost rates each year with Indian Tribes and Indian organizations. Eighty-one Indian Tribes are included in the scope of this analysis. We excluded:

1. All Indian organizations that did not represent a Tribal Government; e.g., contract schools, tribal enterprises, and special purpose tribal consortiums.

2. Any Indian Tribe for which a complete 5-year history was not available.

3. Any Indian Tribe using a direct cost base other than total direct costs.

4. The Navajo Tribe (because the Navajo's Tribe is so much bigger than any other Tribe, its inclusion would distort overall trend data).

The period selected was fiscal years 1979 through 1983. With very few exceptions, Indian Tribes are on the same fiscal year as the Federal Government. Throughout this document, reference to a year means fiscal year of the Indian Tribe.

TYPE OF DATA USED

We used information generated from our indirect cost rate negotiation process, which is not historical accounting data. Rather, it is projected or budgetary data. With few exceptions, our negotiation process involves a process of adjusting projections to actual experience through a process referred to as a carryforward adjustment. Carryforward adjustments have been excluded from consideration. Therefore, all data used was projected, or budgetary.

OTHER POINTS TO CONSIDER

Before reaching conclusions, it is important to know that:

1. Differences in accounting treatment can have an important bearing on what is classified as a direct program cost and what is classified as an indirect cost. In other words, the same cost element can be properly classified differently and the treatment used can have an important bearing on the relationship of direct program costs to administrative costs. This is a very important consideration in comparing indirect rates of individual tribes.

2. Typically, certain costs are excluded from the direct program base when negotiating indirect rates to avoid distortions and inequities. These exclusions generally cover capital expenditures, construction projects, major subcontracts, or what we refer to as pass-through items. Examples of pass-through items are general assistance payments and tuition payments for Indian students. Therefore, what is described as direct program costs for the purpose of this analysis will not coincide with what a Federal agency defines as a direct program cost.

RESULTS OF ANALYSIS

The results of our analysis are presented in the six attached tables. Some of the data is arranged by size of the tribal direct program which will generally correlate with tribal population. The categories used and the number of tribes falling in each category are as follows:

Direct Program (Base)	No. of Tribes
Under $600,000	24
$600,000 to $2 Million	27
$2 Million to $3.5 Million	16
Over $3.5 Million	14
	81

In a few instances, tribes shifted from one category to another during the 5-year period. To preserve the consistency of our data, we left all tribes in only one category—the one in which they most frequently appeared.

The following paragraphs discuss the Tables and the inferences which we have drawn from the data:

Table I shows, by year and by size of base, the changes in both direct program and administrative costs.

1. Direct program increased in 1980 and 1981 and then dropped in 1982 and 1983. For the entire 5-year period, the change was only a plus 2.4 percent. The smaller tribes (base under $600,000) showed a marked deviation with a 44.2 percent increase. We attribute the overall trend directly to changes in the level of Federal programs available to Indian tribes. The apparent anomaly at the small tribal level is probably the result of decisions to contract more BIA programs. BIA funding of the smaller tribes increased by 72 percent from 1979 to 1983.

2. Administrative costs (the pool) increased by 47 percent during the 5-year period. The most significant increases were in 1980 and 1981, but

the upward trend continued in 1982 and 1983 even though direct program fell. Explanations for this trend will vary from tribe to tribe but, in general, we see two major factors. First, Indian tribes have been trying to improve their administration and comply with Federal requirements. This costs more money. Second, administrative costs tend to be more fixed than variable. Consequently, the two categories of cost will not change in the same proportions.

Table II presents data on the indirect rates themselves; i.e., the indirect cost pool divided by the direct program base. The most significant inference to be drawn from the data is that no logical pattern can be detected. Larger tribes would be expected to have lower rates because they have more economy of scale opportunity. While this pattern is reflected in the overall data, it is less definitive than one would expect. The most significant disclosure is the range in rates—from 2.9 percent to 79.4 percent for the entire 5-year period. Extreme ranges in rates are reflected for every size of tribe for every year. We can offer only one explanation. Each tribe decides individually on its level of administrative effort and these decisions tend to be different.

Table III displays data for selected elements of the indirect cost pool which have increased at a significantly greater pace than the overall 47 percent increase in the pool.

1. Salary costs increased by 81.5 percent over the 5-year period. This trend can be justified as part of the overall objective of improving administration. However, we believe there is an additional explanation for the continued increase in 1982 and 1983. This period coincides with reductions in the CETA program which paid for some administrative positions. Consequently, financing of these positions was shifted to the indirect cost pool.

2. Tribal council costs show an 86.2 percent increase over the 5-year period. Our policy is to accept 50 percent of such costs as allocable to direct programs; i.e., allowable indirect cost items. A few tribes are able to justify a higher percentage by presenting documentation showing

that more than 50 percent of the council's time is spent administering direct programs. The trend of increasing tribal council costs is easily explained. Historically, most tribal councils were paid only when they met or were unpaid. As Federal programs became available, more became available for administration and more money to pay for tribal council salaries. The current trend is to place tribal council members on a full time salary basis.

3. Audit costs have gone up 230.5 percent over the 5-year period. The most dramatic increase was 1983 over 1982—up 102.2 percent. This is directly attributable to some tribes contracting with CPA firms to meet audit requirements of OMB Circular A-102, Attachment P. If this trend continues, we believe audit costs will increase by an additional 400 percent.

4. EDP costs increased by 225.7 percent over the 5-year period. This is reflective of the general pattern of increased use of the computer. However, we could not discern any evidence that increased use of the computer produced a reduction in any other cost element.

Table IV shows the composition of funding for direct programs for all 81 tribes. Federal funds comprised 76.2 percent of the direct program base in 1983, and BIA's share was about half of all Federal programs. However, there is a great deal of disparity between tribes, depending on how much money is generated from tribal resources. Thirty-nine of the 81 tribes were over 90 percent dependent on Federal programs while 5 tribes were less than 50 percent dependent.

Table V shows BIA's share of the indirect cost pool for all 5 years for all 81 tribes. BIA's percentage share went from 33.6 percent in 1979 to 37.8 percent in 1983. However, the combination of an increasing share of the pool and an increase in the pool itself resulted in a significant increase in BIA's share of the dollars—from $8.5 million in 1979 to $14.1 million in 1983 (an increase of 65.9 percent). This partially explains why BIA has difficulty in budgeting for its contract support dollars.

Table VI graphically illustrates the data contained in Table I and Table III, respectively. The graphs represent data from all of the 81 tribes included in the trend analysis.

The availability of Federal funds is the dominant consideration affecting both direct and indirect costs. Assuming no significant change in the level of Federal funds for Indian programs, we would expect the trend of the last 5 years to continue. Direct programs will be level or show a slight decline. Indirect costs will continue to increase. The principal reasons for the anticipated continued increases are: (1) the Federal government is imposing new administrative requirements and is requiring a higher level of compliance with existing requirements; (2) internal political considerations will make it difficult to hold the line, particularly in the employment categories and in tribal council categories, and (3) BIA's method of financing indirect costs will continue to provide a motivation for tribes to spend more money in that category.

At the tribal level, the more affluent tribes will be able to operate without difficulty by using their own resources for administration. However, those tribes predominantly dependent on the Federal government will experience great difficulty unless some fundamental changes are made in the financing process.

As previously stated, this report makes no recommendations. However, we are enclosing the following documents, both of which elaborate on problems with indirect cost rates and contract support financing:

Enclosure I—Memorandum of October 16, 1978, from Acting Director Audit and Investigations to Assistant Secretary, BIA; subject, Contract Support/Indirect Cost Rates.

Enclosure II—Memorandum of September 26, 1980, from Inspector General to Assistant Secretary, BIA; subject, Indirect Cost Rates.

TABLE I

TRIBAL TREND ANALYSIS
CHANGES IN DIRECT PROGRAM (BASE) AND ADMINISTRATIVE COSTS (POOL)

	BASE		POOL	
	Dollars (In Millions)	% of Change	Dollars (In Millions)	% of Change
ALL TRIBES				
1979	163.1		25.3	
1980	175.5	+ 7.6	30.2	+ 19.4
1981	189.8	+ 8.1	34.4	+ 13.9
1982	172.3	- 9.2	35.4	+ 2.9
1983	167.0	- 3.1	37.2	+ 5.1
Overall Change		+ 2.4		+ 47.0
Base Under $600,000				
1979	10.4		2.0	
1980	12.4	+19.2	2.8	+ 40.0
1981	15.8	+27.4	3.2	+ 14.3
1982	16.5	+ 4.4	3.9	+ 21.9
1983	15.0	- 9.1	4.2	+ 7.7
Overall Change		+44.2		+100.0
Base Between $600,000 and $2 Million				
1979	32.9		4.6	
1980	35.9	+ 9.1	6.4	+ 39.1
1981	40.2	+12.0	7.4	+ 15.6
1982	36.8	- 8.5	8.3	+ 12.1
1983	34.0	- 7.6	7.9	- 4.8
Overall Change		+ 3.3		+ 71.7
Base Between $2 Million and $3.5 Million				
1979	38.6		6.1	
1980	42.1	+ 9.1	7.8	+ 27.9
1981	46.8	+11.2	8.5	+ 9.0
1982	42.5	- 9.2	8.2	- 3.5
1983	38.6	- 9.1	9.1	+ 11.0
Overall Change		0		+ 49.2
Base Over $3.5 Million				
1979	81.2		12.6	
1980	85.1	+ 4.8	13.2	+ 4.7
1981	87.0	+ 2.2	15.3	+ 15.9
1982	76.5	-12.1	15.0	- 2.0
1983	79.4	+ 3.8	16.0	+ 6.7
Overall Change		- 2.2		+ 27.0

TABLE II

TRIBAL TREND ANALYSIS
RANGE OF INDIRECT COST RATES

By Year/By Size of Base	Average Rate	Range Of Rates
1979		
Under $600,000	19.0	2.9 to 61.5
$600,000 to $2 Million	14.0	5.5 to 38.6
$2 Million to $3.5 Million	16.0	7.6 to 40.5
Over $3.5 Million	15.5	4.8 to 37.4
1980		
Under $600,000	23.0	8.6 to 79.4
$600,000 to $2 Million	17.8	5.2 to 44.7
$2 Million to $3.5 Million	18.6	7.4 to 41.1
Over $3.5 Million	15.5	4.8 to 41.6
1981		
Under $600,000	20.2	6.9 to 57.3
$600,000 to $2 Million	18.4	4.7 to 38.5
$2 Million to $3.5 Million	18.1	8.0 to 47.5
Over $3.5 Million	17.6	1.3 to 47.1
1982		
Under $600,000	23.4	12.7 to 58.8
$600,000 to $2 Million	22.6	10.6 to 50.6
$2 Million to $3.5 Million	19.0	3.0 to 40.9
Over $3.5 Million	19.6	4.8 to 40.3
1983		
Under $600,000	28.1	12.1 to 59.2
$600,000 to $2 Million	23.2	13.1 to 56.7
$2 Million to $3.5 Million	23.7	8.4 to 49.1
Over $3.5 Million	20.2	8.8 to 41.4

TABLE III

TRIBAL TREND ANALYSIS CHANGES IN SELECTED ITEMS OF ADMINISTRATIVE COST

	In Thousands of Dollars			
	All Salaries	Tribal Council	Audit	EDP
1979	10,971	3,026	282	210
1980	14,608	4,705	366	400
1981	17,591	4,560	561	491
1982	19,000	5,282	454	518
1983	19,908	5,633	932	684
Percent of Change	+81.5	+86.2	+230.5	+225.7

EXPLANATORY NOTES

All salaries represent salaries and fringe benefits for those employees funded by the Administrative Cost Pool.

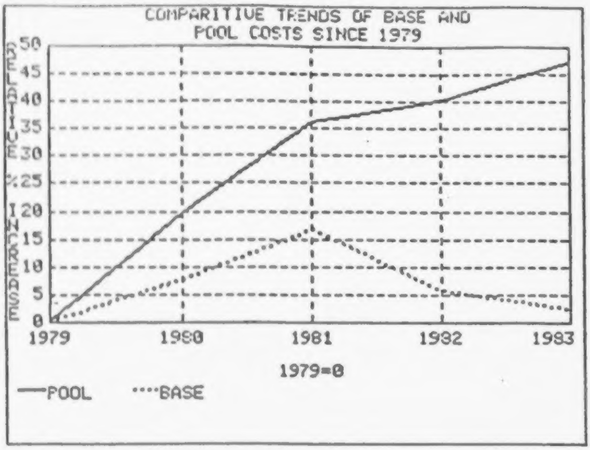
Tribal council represents salaries and fringe benefits for that portion of the Tribal Chairman and Council funded by the indirect cost pool. Generally, only 50 percent of the total costs are included in the pool.

TABLE IV

TRIBAL TREND ANALYSIS
COMPOSITION OF DIRECT PROGRAM (BASE)
BY FUNDING SOURCE

By Year/By Size of Base	Dollars in Millions						
	Total	All Federal		BIA		Other	
	Dollars	Dollars	%	Dollars	%	Dollars	%
1979							
Under $600,000	10.4	9.5	91.3	3.6	34.6	.9	8.7
$600,000 to $2 Million	32.9	26.7	81.2	11.9	36.2	6.2	18.8
$2 Million to $3.5 Million	38.6	32.9	85.2	14.5	37.6	5.7	14.8
Over $3.5 Million	81.2	63.8	78.6	24.8	30.5	17.4	21.4
Total 1979	163.1	132.9	81.5	54.8	33.6	30.2	18.5
1980							
Under $600,000	12.4	10.7	86.2	4.0	32.3	1.6	12.9
$600,000 to $2 Million	35.9	29.7	82.7	13.4	37.5	6.2	17.3
$2 Million to $3.5 Million	42.1	34.4	81.7	14.7	34.9	7.7	18.3
Over $3.5 Million	85.1	61.0	71.7	26.7	31.4	24.1	28.3
Total 1980	175.5	135.8	77.4	58.8	33.5	39.6	22.6
1981							
Under $600,000	15.8	13.8	87.3	5.4	34.2	2.0	12.7
$600,000 to $2 Million	40.2	32.2	80.1	14.5	36.1	8.0	19.9
$2 Million to $3.5 Million	46.8	36.3	77.6	18.3	39.1	10.5	22.4
Over $3.5 Million	87.0	64.5	74.1	27.1	31.1	22.5	25.9
Total 1981	189.8	146.8	77.3	65.3	34.4	43.0	22.7
1982							
Under $600,000	16.5	14.3	86.7	5.9	35.8	2.2	13.3
$600,000 to $2 Million	36.8	30.0	81.5	13.5	36.7	6.8	18.5
$2 Million to $3.5 Million	42.5	32.8	77.2	13.9	32.7	9.7	22.8
Over $3.5 Million	76.5	52.3	68.4	25.5	33.3	24.2	31.6
Total 1982	172.3	129.5	75.1	58.8	34.1	42.9	24.9
1983							
Under $600,000	15.0	13.2	88.0	6.2	41.3	1.8	12.0
$600,000 to $2 Million	34.0	26.5	77.9	14.7	43.2	7.5	22.1
$2 Million to $3.5 Million	38.6	31.2	80.1	16.0	41.5	7.4	19.2
Over $3.5 Million	79.4	56.3	70.1	26.3	33.1	23.1	29.0
Total 1983	167.0	127.2	76.2	63.2	37.8	39.8	23.8

TABLE VI


COMPARITIVE TRENDS OF BASE AND
POOL COSTS SINCE 1979
RELATIVE % INCREASE
50
45
40
35
30
25
20
15
10
5
0
1979
1980
1981
1982
1983
1979=0
POOL
BASE

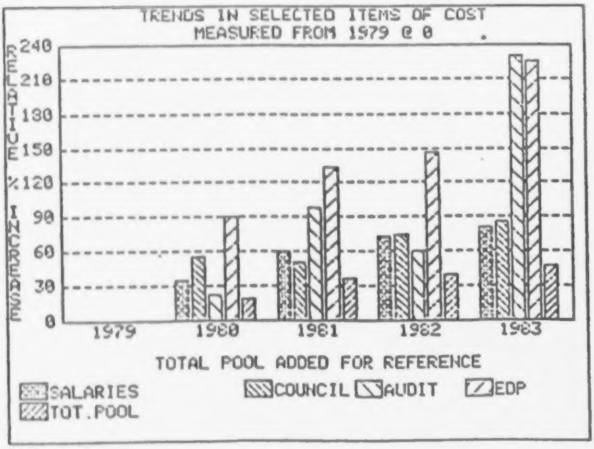

TRENDS IN SELECTED ITEMS OF COST
MEASURED FROM 1979 @ 0
RELATIVE % INCREASE
240
210
180
150
120
90
60
30
0
1979
1980
1981
1982
1983
TOTAL POOL ADDED FOR REFERENCE
SALARIES
COUNCIL
AUDIT
EDP
TOT.POOL

TABLE V

TRIBAL TREND ANALYSIS
BIA SHARE OF POOL

	Dollars in Millions				
	Total Pool	Total Base	BIA Base	% BIA	BIA's Share of Pool
1979	25.3	163.1	54.8	33.6	8.5
1980	30.2	175.5	58.8	33.5	10.1
1981	34.4	189.8	65.3	34.4	11.8
1982	35.4	172.3	58.8	34.1	12.1
1983	37.2	167.0	63.2	37.8	14.1

Enclosure I
Page 1 of 3

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 26 1980

MEMORANDUM

To: Assistant Secretary - Indian Affairs

From: Inspector General

Subject: Indirect Cost Rates

On August 12, 1980 I advised the Commissioner of Indian Affairs that we would furnish a report outlining, from our perspective, some of the basic problems and possible solutions related to indirect cost rates. This memorandum responds to that commitment.

First, we have the problem of Indian organizations, principally contract schools, that cannot function effectively under indirect cost rates because they are totally dependent on Federal financing. As mentioned in my August 12, 1980 memorandum, we believe that these organizations face an impossible situation in trying to deal with the unavoidable uncertainties of indirect cost rates. Recently, BIA's contract schools formed a coalition to address this problem.

With respect to the contract school situation, these schools need a firm administrative budget (a lump sum) so that they can plan and operate with a degree of certainty. Since these schools have traditionally been a BIA responsibility, the consensus is that BIA should finance all, or substantially all, of contract schools' administrative costs. However, BIA does not have the budget base to do this because, under the indirect cost rate process, other Federal agencies have shared the cost. Consequently, while the lump sum approach is highly desirable in terms of simplicity and establishing a firm basis for planning, proceeding under the premise that BIA will bear all the administrative costs runs into budgetary constraints. In the short term, these constraints may be insurmountable.

We see two options for making the lump sum approach work.

1. For BIA to obtain additional appropriations.

2. To work out joint funding arrangements with the Department of Education (DEd).

The first option needs no discussion. With respect to the second option, we recently reviewed a draft OMB Circular establishing a Federal Assistance Management System. Under this system, units of state and local government would have the option of dealing with a single Federal management agency. The Federal management agency would, in effect, serve as the fiscal agent for all Federal agencies and would be authorized to disburse all Federal funds. (There would be only one letter of credit.) As we see it, the Federal assistance management system could be an ideal mechanism for working joint funding with DEd and, in general, handling financial arrangements with contract schools.

Other basic problems associated with indirect cost rates have been previously brought to the attention of the Assistant Secretary for Indian Affairs in an October 16, 1978 memorandum from the Acting Director of Audit and Investigation (copy attached). Although the points brought out in that memorandum were discussed at length, nothing happened and the situation remains unchanged.

Our principal complaint was (and still is) that contract support funds (as a separate budget activity) are undesirable. Since the contract support dollar is over and above the identified budget level of the Indian organization, a motivation is created to get a larger share of these funds by increasing the indirect cost pool. To illustrate, our Central Region compared the indirect cost pools for 46 Indian organizations submitting proposals in each of fiscal years 1978, 1979, and 1980. The indirect cost pools totaled $9.2 million for 1978, $11.0 million in 1979, and $11.9 million in 1980. Thus, in a 2-year period the indirect costs for these 46 Indian organizations experienced a 29 percent growth.

Demands on BIA contract support dollars are also increased because more Indian organizations are seeking indirect cost rates. Again using statistics from our Central Region, 61 rates were negotiated in fiscal year 1978, 71 rates were negotiated in fiscal year 1979, and 78 rates (estimated) will have been negotiated in fiscal year 1980. The 2-year increase amounts to 28 percent.

We are also concerned because the current method of delivering the contract support dollar tends to reward the more affluent tribes. As explained in our October 16, 1978 memorandum, this occurs because merging indirect cost rates and contract support created a situation where affluent tribes with the largest administrative organisation naturally have a higher indirect cost rate than the less affluent tribes with the smaller administrative organization. A higher indirect cost rate translates to a larger share of the contract support dollar.

To illustrate the point, Tribe A, with 2,360 enrolled members, is wealthy in natural resources. In 1978 (the latest year covered by our data) it realized a net income of $14.4 million from the sale of natural resources and other operations, and at the end of 1978, the tribe's net worth was stated at $151.5 million, of which $39.4 million was in the form of cash assets. For fiscal year 1980, Tribe A projected direct program costs of $8.8 million, of which $1.7 million, or about 20 percent, was applicable to BIA. Tribe A's indirect cost rate for 1980 is 39 percent, which means that Tribe A should receive over $600,000 in contract support funds from BIA.

In contrast, Tribe B, which is of comparable size to Tribe A, has little in the way of natural resources. Income from tribal resources runs under

$100,000 a year, and the tribe's net worth was stated at $5.9 million as of September 30, 1978. In its fiscal year 1980 indirect cost proposal, Tribe B projected direct programs of $1,136,000, of which $370,000 was applicable to BIA. We negotiated a 15-percent rate with Tribe B, which means that Tribe B will receive about $55,000 in contract support funds.

In our opinion, the contract support concept had validity in so far as it provided a means of financing the incremental costs incurred by Indian tribes as a consequence of taking over BIA programs. However, the concept was never really implemented because the contract support dollar was delivered by the indirect cost rate mechanism, which is not the same as incremental costs. As previously mentioned, the contract support dollar is creating what we perceive as negative motivation and is providing a disproportionate share of financial support to the tribes which need it the least.

In our memorandum of October 16, 1978 we made no formal recommendations. But because few, if any, positive steps have been taken, we are making the following recommendations at this time:

1. With respect to contract support, the separate budget category should be eliminated. The present budget level should be merged with BIA's basic program and included as part of the band analysis on a tribe-by-tribe basis. BIA should use future budgetary increases to remedy the imbalances which have been created over the past several years.

2. With respect to contract schools, BIA should take the initiative in trying to work out a joint funding arrangement (for administrative costs) with DEd. We further recommend that BIA seek assistance from OMB to use the Federal Assistance Management System as the mechanism to achieve joint funding.

By this memorandum we are requesting your comments on the above recommendations within 60 days as required by 306 DM 7.3.

for Wanda J. Smith
June Gibbs Brown

Attachment

cc: Secretary
Under Secretary
Executive Assistant to the Secretary
Solicitor
Commissioner of Indian Affairs
Director, Office of Indian Education
Assistant Secretary - Policy, Budget and Administration
Director of Public Affairs

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6
UNITED STATES GOVERNMENT

Memorandum

Enclosure II
Page 1 of 1

TO : Assistant Secretary for Indian Affairs

DATE: October 16, 1978

FROM : Acting Director of Audit and Investigation

SUBJECT: Contract Support/Indirect Cost Rates

As you know, this office negotiates indirect cost rates for most Indian tribes and tribal organizations. In connection with this process, we are often questioned about the availability of contract support funds to finance BIA's portion of indirect costs. We are also exposed to problems which arise when Federal agencies do not pay their full share of indirect costs. The purpose of this memorandum is to make sure that you are aware of these problems.

The first problem relates to the manner in which contract support funds are distributed.

1. Contract support was justified on the basis that Indian organizations were incurring additional or incremental costs as the result of accepting Public Law 93-638 contracts and that additional funding (over and above that identified to programs) was needed.

2. Indirect costs are those incurred for a common or joint purpose benefiting more than one program; i.e., they cannot be readily or conveniently assigned to individual programs. An indirect cost rate is the ratio of all indirect costs to an allocation base, normally either total direct salaries and wages or total direct costs.

The rationale behind both concepts is totally valid. The problem is that BIA, in effect, merged the two concepts when it decided to finance indirect costs from contract support funds. Indirect costs have only a remote relationship to incremental or additional costs incurred by Indian organizations as a result of Public Law 93-638 contracts. The preponderance of indirect costs are not incremental. In other words, they were being incurred before Indian organizations started to contract; and they would have been incurred anyway. The net result is that contract support costs are being used, for the most part, to finance essentially fixed indirect costs of tribal government which were previously financed from tribal funds.

There really isn't anything objectionable about paying a portion of fixed indirect costs because these costs are allocable to all programs. However, contract support funds were justified on the basis that they would be used to finance incremental costs. (All other Federal agencies finance all indirect costs from program funds.)

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Use of contract support funds to finance indirect costs creates two undesirable situations:

1. Contract support funds are additional funds to the Indian organization (over and above its identified budget level). Most Indian organizations try to get a bigger piece of the pie, thus creating a motivation to expand the indirect cost pool. This can be accomplished in two ways - either by expanding their administrative organization or by changing the accounting system to shift more costs to the indirect category. We consider the basic motivation created to be undesirable because Federal programs should be constructed to promote economy and efficiency. Contract support funds produce the reverse tendency.

2. The more affluent Indian organizations have historically had the more elaborate administrative organization because they could afford it. The less affluent have made do with less, sometimes approaching practically no administrative organization. As previously stated, when BIA decided to use contract support funds to finance indirect costs our experience shows that most of the money went to pay for costs that were already being incurred. The big winners were the affluent tribes with the elaborate administrative organizations. Thus, BIA created a situation where those who needed the least got the most and those who needed the most got the least. BIA should have sought the opposite result.

We believe this problem can be remedied by modifying BIA's budget structure and phasing out contract support funds, and transferring the funds as direct program dollars to the Indian organizations' budget base. Thereafter, indirect costs would be financed from program funds, which is the procedure used by other Federal agencies.

The second problem relates to Indian organizations which are 100 percent federally financed and which accept Federal programs without getting full indirect cost recovery. Organizationally, we are talking about consortiums of Indian tribes which take on programs for the benefit of several tribes, contract schools, and a few tribal governments which have no tribal income. The principal program is CETA which has a statutory limitation on the indirect costs it can pay. There is a problem with ESEA Title 7 which has a restrictive administrative policy. And some individual grant administrators will attempt to negotiate lower rates when sufficient funds are not available or when they feel that the indirect cost rate is unreasonable.

The rules for establishing indirect cost rates require the assignment of indirect costs to all programs, regardless of whether the program actually financed its fair share. This means that, if one Federal program cannot or will not pay its fair share of indirect costs, the shortfall cannot be shifted to another Federal program. The grantee or contractor must pay the difference himself.

This is not a big problem for Indian organizations with adequate resources and we are now making sure that they understand the implications of accepting a contract or grant without full indirect cost recovery. However, the 100 percent federally funded organizations do not have the resources to pay the difference. The way the system works, there is no way they can take on a program with less than full indirect cost recovery and still come out whole. Their only alternative is to decline the program. This can have undesirable consequences for Indian communities which are denied the program. It can also mean substantially higher costs for the remaining programs because indirect costs are spread over a smaller base.

BIA's current policy precludes use of contract support funds to finance any indirect cost deficit applicable to a program administered by another Federal agency. We have suggested that, under rigidly controlled circumstances, exceptions to this policy may be warranted. For example, if some Indian organizations are forced to drop their CETA programs, the results can be:

1. Higher reservation unemployment
2. Higher general assistance payments by BIA
3. Higher indirect cost charges to remaining Federal programs

We believe that, in some situations, the evidence clearly demonstrates that the best interests of all parties would be served if BIA paid the indirect cost deficiency of other Federal programs out of contract support funds (as a special line item). We have proposed this to your staff but the consensus was that BIA does not have the authority. We suggest that BIA take prompt action to obtain the necessary authority.

Please consider this memorandum advisory in nature. A response is not required.

William L. Kendig